

A DIGEST  
OF  
THE LAW OF ENGLAND  
WITH REFERENCE TO  
THE CONFLICT OF LAWS.

BY  
A. V. DICEY, K.C., HON. D.C.L.,  
OF THE INNER TEMPLE; VINERIAN PROFESSOR OF ENGLISH LAW IN THE UNIVERSITY OF OXFORD;  
FELLOW OF ALL SOULS COLLEGE, OXFORD; HON. LL.D., CAMBRIDGE, GLASGOW AND EDINBURGH.

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To  
THE RIGHT HON. ARTHUR COHEN  
ONE OF HIS MAJESTY'S COUNSEL  
WHOSE MASTERY OF LEGAL PRINCIPLES  
IS SURPASSED ONLY BY  
THE KINDNESS WITH WHICH HIS LEARNING AND EXPERIENCE  
ARE PLACED AT THE SERVICE OF  
HIS FRIENDS



## PREFACE

### TO SECOND EDITION.



THIS treatise was published in 1896. My aim in this Second Edition is to bring the Work up to date, and to embody in it the effect of the numerous and sometimes very important cases bearing on the Conflict of Laws which have been decided by our Courts during the last twelve years. Hence I have dwelt upon some questions which were either not considered at all or were but slightly touched upon in the First Edition. I have, for example, tried to determine how far English Courts accept the doctrine of the *renvoi*, what is the legal effect of the De Nicols cases, and what may be the extra-territorial validity of Indian or Colonial divorces of persons not domiciled in the country where the divorce is granted.

The present Edition, however, though it deals with some topics to which little or no reference is made in the First Edition of this treatise, is substantially the same Work as the book published in 1896. One change alone requires to be noted. This alteration is the omission of the notes of American cases furnished by the industry and knowledge of Professor J. B. Moore. The omission is due to two causes: The first is that while American authorities are comparatively little used by English lawyers, it is, as I have found

from experience, impossible in a work mainly intended for English readers to introduce a collection of American cases sufficiently complete to meet the wants of American lawyers: The second cause is that the publication since 1896 of Professor Beale's admirable *Selection of Cases on the Conflict of Laws*—a book which ought to be found in every law library—supplies an account of every leading case, whether American or English, which a practising lawyer will wish to consult.

It is a pleasure to acknowledge the help I have received from various friends in the preparation of this Edition. Mr. ARTHUR COHEN's suggestions have been numerous and important. In every passage of my Work which refers to the subject of administration or succession I have had the advantage of the criticism of Mr. ELGOOD; it has greatly aided me in introducing into my Digest changes of language necessitated by the passing of the Land Transfer Act, 1897. Mr. A. B. KEITH's extensive knowledge of Colonial law has enabled me to express a more decided opinion than I could otherwise have formed on the extra-territorial effect of Indian and of Colonial divorces. My colleague Mr. GELDART has given me great assistance in the attempt to exhibit in the form of rules the principles which govern the execution of powers of appointment by will in cases connected with the Conflict of Laws.

A. V. DICEY.

FROM THE

PREFACE TO FIRST EDITION.

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My aim in this book is to apply to the whole field of private international law the method of treatment already applied to a large part thereof in my book on the law of domicil. In the following pages the principles of private international law recognised by English Courts—or, to use an exactly equivalent expression, the principles adhered to by English judges when dealing with the conflict of laws—are treated as a branch of the law of England: these principles are exhibited in the form of systematically arranged Rules and Exceptions, and each of these Rules and Exceptions is, when necessary, elucidated by comment and illustrations. Hence this treatise has a twofold character. It is, or rather it contains, a second and carefully corrected edition of *The Law of Domicil as a Branch of the Law of England*. It is also a complete digest of and commentary on the law of England with reference to the conflict of laws.

\* \* \* \* \*

That the attempt to form a digest of private international law, as administered by the English Courts, should result in anything like complete success, is more than I can hope. This branch of law has been created within little more than a century by a series of judicial decisions, and is now, to the great benefit of the public, year by year extended and developed through the legislative activity of our judges. This development has not yet reached its term. No one therefore can finally sum up its results. That even the endeavour to form a digest of private international law should be possible, is due to the labours of my predecessors. This field of law has been fully explored by Story, Westlake, Foote, Wharton, and Nelson. The works of these

authors have, during the composition of this treatise, never been long out of my hands. I have also sought the guidance, when I could obtain it, of English writers who have dealt either directly or indirectly with special departments of private international law; thus on the difficult subject of foreign judgments I have been greatly aided by Mr. Piggott's ingenious and exhaustive monograph: nor have I neglected to consult foreign jurists, such as Savigny, Bar, and Fœlix, who, even when they disagree with the conclusions arrived at by English judges, often throw considerable light, if it be only by way of contrast, on the doctrines maintained in England with regard to the conflict of laws. To no single English writer, let me add, am I more deeply indebted than to Mr. Westlake. The soundness and thoroughness of his workmanship can be appreciated only by readers who, like myself, have made an elaborate study of his *Treatise on Private International Law*. There will be found, indeed, in the following pages, several expressions of dissent from his conclusions. Such criticism, however, so far from being the result of any underestimate of is in reality a tribute to his merits. Whenever it was my misfortune to disagree on any material matter with an opinion of Mr. Westlake, it was due to my readers to state that my own view lacked the support to be derived from his concurrence, and due to myself to explain, and if possible to justify, my dissent from conclusions which carry the weight of his authority.

It is a pleasure, no less than a duty, to return my heartfelt thanks to the many friends who have aided me in the production of this book.

From my friend Mr. Arthur Cohen I have received help which is in the strictest sense invaluable. His advice has often removed difficulties with which I should not myself have been able to cope, and any novelty which may be found in the book is due in great measure to his ingenious and fertile suggestions. To my friend and colleague Professor Holland, also, I am under intellectual obligations of a special character. My whole conception of private international law has been influenced by views expressed by him, not only in his writings but in his conversation. There is more

than one fundamental idea embodied in this work of which, owing to our constant intercommunication of thought, I should find it hard to say whether it originated in my own mind or was suggested to me by my friend. My special thanks are also due to Mr. John M. Gover, who has added to this treatise a carefully prepared index, and to the many officials and others who have given me information on matters of detail where my own knowledge was at fault. On questions connected with grants of probate, or letters of administration, I have enjoyed the great advantage of consulting Mr. Musgrave, of the Probate Registry, whilst my friend Mr. Highmore, of the Inland Revenue Office, and Mr. Norman, the author of the admirable *Digest of the Death Duties*, have spared no pains to explain to me details with regard to the incidence of the Death Duties and the Duties of Income Tax. But for every statement in this work I alone am responsible. Whatever errors it contains are wholly my own. Whatever merits it may exhibit are due in no small degree to the authors whose works I have studied, and whose conclusions I have reproduced, and to the many friends from whom I have received help and encouragement.

A. V. DICEY.

1896.





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<sup>1</sup> The references are to W. Guthrie's translation of Savigny's treatise, which forms the eighth volume of his *System des Heutigen Romischen Rechts*. The sections referred to are those of the original work. The pages are the pages of the translation.

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## TABLE OF PRINCIPLES AND RULES.

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### INTRODUCTION.

#### *GENERAL PRINCIPLES.*

##### *Jurisdiction and Choice of Law.*

GENERAL PRINCIPLE No. I.—Any right which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised by English Courts. (p. 23.)

GENERAL PRINCIPLE No. II.—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country—

(A) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation ;

(B) Where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political institutions ;

(C) Where the enforcement of such right involves interference with the authority of a foreign sovereign within the country whereof he is sovereign. (p. 33.)

##### *Jurisdiction.*

GENERAL PRINCIPLE No. III.—The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i.e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i.e.*, has no right to adjudicate upon) any matter with regard to which he cannot give an effective judgment. (p. 40.)

SUB-RULE.—When with regard to any matter (*e.g.*, divorce) the Courts of no one country can give a completely effective judgment,

but the Courts of several countries can give a more or less effective judgment, the Courts of that country where the most effective judgment can be given have a preferential jurisdiction. (p. 43.)

GENERAL PRINCIPLE No. IV.—The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction, or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction. (p. 44.)

*Choice of Law.*

GENERAL PRINCIPLE No. V.—The nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired. (p. 58.)

GENERAL PRINCIPLE No. VI.—Whenever the legal effect of any transaction depends upon the intention of the party or parties thereto, as to the law by which it was governed, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties. (p. 59.)

## BOOK I.

## PRELIMINARY MATTERS.

## CHAPTER I.

## INTERPRETATION OF TERMS.

*I. DEFINITIONS.*

IN the following Rules and Exceptions, unless the context or subject-matter otherwise requires, the following terms have the following meanings :—

1. " This Digest " means the Rules and Exceptions contained in Books I. to III. of this treatise.

2. " Court " means His Majesty's High Court of Justice in England.

3. " Person " includes a corporation or body corporate.

4. " Country " means the whole of a territory subject under one sovereign to one system of law.

5. " State " means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign.

6. " Foreign " means not English.

7. " Foreign country " means any country which is not England.

8. " England " includes any ship of the Royal Navy wherever situate.

9. " United Kingdom " means the United Kingdom of England, Scotland and Ireland, and the islands adjacent thereto ; but does not include either the Isle of Man or the Channel Islands.

10. " British dominions " means all countries subject to the Crown, including the United Kingdom.

11. " Domicil " means the country which in accordance with the Rules in this Digest is considered by law to be a person's permanent home.

12. " Independent person " means a person who as regards his

domicil is not legally dependent, or liable to be legally dependent, upon the will of another person.

13. "Dependent person" means any person who is not an independent person as hereinbefore defined, and includes—

- (i) a minor;
- (ii) a married woman.

14. "An immovable" means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real.

15. "A movable" means a thing which is not an immovable, and includes—

- (i) a thing which can be touched and can be moved, and
- (ii) a thing which is the object of a claim, and cannot be touched, or, in other words, a *chose in action*.

16. "*Lex domicilii*," or "law of the domicile," means the law of the country where a person is domiciled.

17. "*Lex loci contractus*" means the law of the country where a contract is made.

18. "*Lex loci solutionis*" means the law of the country where a contract is to be performed.

19. "*Lex situs*" means the law of the country where a thing is situate.

20. "*Lex fori*" means the local or territorial law of the country to which a Court, wherein an action is brought, or other legal proceeding is taken, belongs. (p. 67.)

## II. APPLICATION OF TERM "*LAW OF COUNTRY*."

In this Digest the law of a given country (*e.g.*, the law of the country where a person is domiciled)—

- (i) means, when applied to England, the local or territorial law of England;
- (ii) means, when applied to any foreign country, any law, whether it be the local or territorial law of that country or not, which the Courts of that country apply to the decision of the case to which the Rule refers. (p. 79.)



## CHAPTER II.

## DOMICIL.

## (A) DOMICIL OF NATURAL PERSONS.

## I. NATURE OF DOMICIL.

RULE 1.—The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law. (p. 82.)

RULE 2.—No person can at any time be without a domicile. (p. 97.)

RULE 3.—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile (?). (p. 98.)

*Exception.*—A person within the operation of the Domicile Act, 1861, 24 & 25 Vict. c. 121, may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes. (p. 101.)

RULE 4.—A domicile once acquired is retained until it is changed

- (1) in the case of an independent person, by his own act;
- (2) in the case of a dependent person, by the act of someone on whom he is dependent. (p. 102.)

## II. ACQUISITION AND CHANGE OF DOMICIL.

*Domicil of Independent Persons.*

RULE 5.—Every independent person has at any given moment either

- (1) the domicile received by him at his birth (which domicile is hereinafter called the domicile of origin), or
- (2) a domicile (not being the same as his domicile of origin) acquired or retained by him while independent by his own act (which domicile is hereinafter called a domicile of choice). (p. 103.)

*Domicil of Origin.*

RULE 6.—Every person receives at (or as from) birth a domicile of origin.

- (1) In the case of a legitimate child born during his father's

lifetime, the domicile of origin of the child is the domicile of the father at the time of the child's birth.

- (2) In the case of an illegitimate or posthumous child, the domicile of origin is the domicile of his mother at the time of his birth.
- (3) In the case of a foundling, the domicile of origin is the country where he is born or found.
- (4) In the case of a legitimated person, the domicile which his father had at the time of such person's birth becomes, and is considered to be, the domicile of origin of such person (?). (p. 104.)

#### *Domicil of Choice.*

RULE 7.—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise. (p. 108.)

#### *Change of Domicil.*

##### RULE 8.

- (1) The domicile of origin is retained until a domicile of choice is in fact acquired.
- (2) A domicile of choice is retained until it is abandoned, whereupon either
  - (i) a new domicile of choice is acquired; or
  - (ii) the domicile of origin is resumed. (p. 119.)

#### *Domicil of Dependent Persons (Minors and Married Women).*

RULE 9.—The domicile of every dependent person is the same as, and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependent. (p. 124.)

SUB-RULE 1.—Subject to the exceptions hereinafter mentioned, the domicile of a minor is during minority determined as follows:—

- (1) The domicile of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicile of his father.
- (2) The domicile of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicile of the mother (?).

- (3) The domicile of a minor without living parents, or of an illegitimate minor without a living mother, possibly is the same as, and changes with, the domicile of his guardian, or may be changed by his guardian (?). (p. 125.)

*Exception 1 to Sub-Rule.*—The domicile of a minor is not changed by the mere re-marriage of his mother. (p. 130.)

*Exception 2 to Sub-Rule.*—The change of a minor's home by a mother or a guardian does not, if made with a fraudulent purpose, change the minor's domicile. (p. 131.)

SUB-RULE 2.—The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband. (p. 132.)

RULE 10.—A domicile cannot be acquired by a dependent person through his own act. (p. 133.)

SUB-RULE.—Where there is no person capable of changing a minor's domicile, he retains, until the termination of his minority, the last domicile which he has received. (p. 134.)

RULE 11.—The last domicile which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act. (p. 135.)

SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during his minority until he changes it. (p. 135.)

SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it. (p. 135.)

SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of divorce, until she changes it. (p. 136.)

### III. ASCERTAINMENT OF DOMICIL.

#### *Domicil—How Ascertained.*

RULE 12.—The domicile of a person can always be ascertained by means of either

- (1) a legal presumption; or
- (2) the known facts of the case. (p. 136.)

#### *Legal Presumptions.*

RULE 13.—A person's presence in a country is presumptive evidence of domicile. (p. 137.)

RULE 14.—When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile. (p. 139.)

*Facts which are Evidence of Domicil.*

RULE 15.—Any circumstance may be evidence of domicile, which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country. (p. 139.)

RULE 16.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicile. (p. 141.)

RULE 17.—Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*), and in so far evidence of domicile. (p. 142.)

RULE 18.—Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*animus manendi*). (p. 144.)

(B) DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

RULE 19.—The domicile of a corporation is the place considered by law to be the centre of its affairs, which

- (1) in the case of a trading corporation, is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on ;
- (2) in the case of any other corporation, is the place where its functions are discharged. (p. 160.)

CHAPTER III.

BRITISH NATIONALITY.

RULE 20.

- (1) "British subject" means any person who owes permanent allegiance to the Crown.
- (2) "Natural-born British subject" means a British subject who has become a British subject at the moment of his birth.
- (3) "Naturalized British subject" means any British subject who is not a natural-born British subject.

- (4) "Alien" means any person who is not a British subject.  
 (5) "Statutory alien" means any person who, having been a natural-born British subject, has become an alien in accordance with any of the following Rules.

The term includes a widow who, having been a natural-born British subject, has, in accordance with Rules 31 and 32, become an alien by, or in consequence of, her marriage with an alien.

- (6) "Disability" means the status of being an infant, lunatic, idiot, or married woman.  
 (7) "Declaration of alienage" means a declaration of a person's desire to be an alien, made in the manner and form provided by the Naturalization Act, 1870. (p. 164.)

RULE 21.—Every natural person is either a British subject or an alien. (p. 165.)

(A) ACQUISITION OF BRITISH NATIONALITY AT BIRTH  
 (NATURAL-BORN BRITISH SUBJECTS).

RULE 22.—Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject. (p. 166.)

*Exception 1.*—Any person who (his father being an alien enemy) is born in a part of the British dominions which, at the time of such person's birth, is in hostile occupation, is an alien. (p. 167.)

*Exception 2.*—Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state, is (though born within the British dominions) an alien. (p. 168.)

RULE 23.—Subject to the exception hereinafter mentioned, any person

- (1) whose father is born within the British dominions, or
- (2) whose paternal grandfather is born within the British dominions,

is (though not born within the British dominions) a natural-born British subject.

Provided that no person is under this Rule a natural-born British subject whose father is not at the time of such person's birth a natural-born British subject. (p. 168.)

*Exception.*—Any person born out of the British dominions, whose father, though a natural-born British subject, is, at the time of such person's birth, in the actual service of any foreign prince or state in enmity with the Crown, is not a natural-born British subject. (p. 171.)

RULE 24.—Any person whose father (being a British subject) is, at the time of such person's birth, an ambassador or other public minister in the service of the Crown, is (though born out of the British dominions) a natural-born British subject. (p. 171.)

SUB-RULE.—British nationality is not inherited through women. (p. 172.)

## (B) ACQUISITION, LOSS AND RESUMPTION OF BRITISH NATIONALITY AT PERIOD OF LIFE LATER THAN BIRTH.

### I. ACQUISITION, LOSS, &c. BY PERSON NOT BEING UNDER ANY DISABILITY.

#### (i) *Acquisition.*

RULE 25.—An alien [not being under any disability (?)] who, within such limited time before making the application hereinafter mentioned as may be allowed by one of His Majesty's Principal Secretaries of State [hereinafter referred to as the Secretary of State], either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to the Secretary of State for a certificate of naturalization.

The applicant must adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The Secretary of State, if satisfied with the evidence adduced, must take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good; and no appeal lies from his decision, but such certificate does not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalization is granted is, in the United Kingdom, entitled to all political and other rights,

powers, and privileges, and is subject to all obligations, to<sup>2</sup> which a natural-born British subject is entitled, or subject in the United Kingdom, with this qualification, that he is not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, to be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect. (p. 172.)

(ii) *Renunciation.*

RULE 26.—Any British subject who has at any time before, or may at any time after, the 12th day of May, 1870, when in any foreign state and not under any disability, voluntarily become naturalized in such state, is, from and after the time of his so having become naturalized in such foreign state, to be deemed to have ceased to be a British subject and to be regarded as an alien. (p. 176.)

RULE 27.—Where the Crown has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it may be declared, by Order in Council, that such convention has been entered into by the Crown; and from and after the date of such Order in Council, any person [not being under any disability (?) and] being originally a subject or citizen of the state referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person is to be regarded as an alien, and as a subject of the state to which he originally belonged as aforesaid. (p. 177.)

RULE 28.—Any person who by reason of his having been born within the British dominions is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if not under any disability, make a declaration of alienage, and from and after the making of such declaration of alienage such person ceases to be a British subject, *i.e.*, becomes an alien. (p. 177.)

RULE 29.—Any person who is born out of the British dominions, of a father being a British subject, may, if not under any disability, make a declaration of alienage, and from and after the

making of such declaration ceases to be a British subject, *i.e.*, becomes an alien. (p. 178.)

(iii) *Resumption.*

RULE 30.—Any statutory alien [not being under any disability (?)] may, on performing the same conditions and adducing the same evidence as is required under Rule 25 in the case of an alien applying for a certificate of naturalization, apply to the Secretary of State for a certificate (hereinafter referred to as a certificate of re-admission to British nationality) re-admitting him to the status of a British subject. The Secretary of State has the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance is in like manner required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted, from the date of the certificate of re-admission, but not in respect of any previous transaction, resumes his position as a British subject; with this qualification, that, within the limits of the foreign state of which he became a subject, he is not to be deemed to be a British subject unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect.

The jurisdiction exercisable under this Rule by the Secretary of State in the United Kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession is, in the case of such person, to be deemed equivalent to residence in the United Kingdom. (p. 178.)

## II. ACQUISITION, LOSS, &c., BY PERSON BEING UNDER DISABILITY.

(i) *Married Woman.*

RULE 31.—A married woman is to be deemed to be a subject of the state of which her husband is for the time being a subject. (p. 180.)

RULE 32.—A widow continues to be the subject of the state of which her late husband was at his death a subject, until she changes her nationality. (p. 181.)

RULE 33.—A divorced woman continues to be the subject of



the state of which her husband was a subject immediately before or at the moment of divorce, until she changes her nationality (?). (p. 181.)

(ii) *Infant.*

RULE 34.—Where a father, or a mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother, who during infancy has become resident with such father or mother in any part of the United Kingdom, or with such father while in the service of the Crown out of the United Kingdom, is to be deemed to be a naturalized British subject.

[This Rule applies (*semble*) to children born out of the British dominions as well after as before the parent's naturalization.] (p. 182.)

RULE 35.—Where a father being a British subject, or a mother being a British subject and a widow, becomes an alien under any of the foregoing Rules, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, is to be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject. (p. 185.)

RULE 36.—Where a father, or a mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother, who during infancy has become resident in the British dominions with such father or mother, is to be deemed to have resumed the position of a British subject to all intents. (p. 187.)

RULE 37.—Subject to the exceptions hereinafter mentioned, any person who is not a British subject under Rules 20 to 36 is an alien. (p. 188.)

*Exception 1.*—Any person is a British subject who is made so by virtue of letters of denization. (p. 190.)

*Exception 2.*—Any person is a British subject who is naturalized under or by any Act of Parliament. (p. 190.)

*Exception 3.*—Any person is a British subject within the limits of any British possession, *i.e.*, of any colony, plantation, island, territory, or settlement in the British dominions, who is naturalized by any law duly made by the legislature of such possession. (p. 190.)

## BOOK II.

## JURISDICTION.



## PART I.

## JURISDICTION OF THE HIGH COURT.

## CHAPTER IV.

## GENERAL RULES AS TO JURISDICTION.

## (A) WHERE JURISDICTION DOES NOT EXIST.

*(i) In Respect of Persons.*

RULE 38.—The Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceeding against

- (1) any foreign sovereign;
- (2) any ambassador or other diplomatic agent representing a foreign sovereign and accredited to the Crown;
- (3) any person belonging to the suite of such ambassador or diplomatic agent.

An action or proceeding against the property of any of the persons enumerated in this Rule is, for the purpose of this Rule, an action or proceeding against such person. (p. 195.)

*Exception 1.*—The Court has jurisdiction to entertain an action against a foreign sovereign, or (*semble*) an ambassador, diplomatic agent, or other person coming within the terms of Rule 38 (2) and (3), if such foreign sovereign, ambassador, or other person, having appeared before the Court voluntarily, waives his privilege and submits to the jurisdiction of the Court. (p. 198.)

*Exception 2.*—The Court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade (?). (p. 200.)

*(ii) In Respect of Subject-Matter.*

RULE 39.—Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land), or
  - (2) the recovery of damages for trespass to such immovable.
- (p. 201.)

*Exception.*—Where the Court has jurisdiction to entertain an action against a person under either Rule 45, or under any of the Exceptions to Rule 46, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either

- (a) a contract between the parties to the action, or
  - (b) an equity between such parties,
- with reference to such immovable. (p. 203.)

RULE 40.—The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign country. (p. 207.)

**(B) WHERE JURISDICTION EXISTS.***(i) In Respect of Persons.*

RULE 41.—Subject to Rule 38, and to the exception hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the Court, *i.e.*, any person may be a party to an action or other legal proceeding in the Court. (p. 210.)

*Exception.*—The Court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the license or protection of the Crown.

The term “alien enemy” includes any British subject or citizen of a neutral state voluntarily residing during a war with Great Britain in a hostile country. (p. 211.)

RULE 42.—The Court has jurisdiction in an action over any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court. (p. 211.)

(ii) *In Respect of Subject-Matter.*

RULE 43.—The Court has jurisdiction to entertain proceedings for the determination of any right over or in respect of

(1) any immovable ;

(2) any movable,

situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the Court in particular kinds of action or proceedings. (p. 214.)

RULE 44.—Subject to Rules 38 to 40, the Court exercises—

(1) Jurisdiction in actions *in personam* ;

(2) Admiralty jurisdiction *in rem* ;

(3) Divorce jurisdiction, and jurisdiction in relation to validity of marriage and to legitimacy ;

(4) Jurisdiction in bankruptcy ;

(5) Jurisdiction in matters of administration and succession ;

to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction. (p. 215.)

## CHAPTER V.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 45.—When the defendant in an action *in personam* is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises. (p. 217.)

RULE 46.—When the defendant in an action *in personam* is, at the time for the service of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action. (p. 222.)

*Exception 1.*—The Court has jurisdiction to entertain an action against a defendant who is not in England, whenever the whole subject-matter of the action is land situate in England (with or without rents or profits). (p. 225.)

*Exception 2.*—The Court has jurisdiction whenever any act, deed [will], contract, obligation, or liability affecting land or hereditaments situate in England is sought to be construed, rectified, set aside, or enforced in the action. (p. 226.)

*Exception 3.*—The Court has jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England. (p. 229.)

*Exception 4.*—The Court has jurisdiction whenever the action is for the execution (as to property situate in England) of the trusts of any written instrument of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England. (p. 232.)

*Exception 5.*—The Court has jurisdiction whenever the action is founded on any breach, or alleged breach, in England, of any contract, wherever made, which, according to the terms thereof, ought to be performed in England, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland. (p. 233.)

*Exception 6.*—The Court has jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed, whether damages are or are not sought in respect thereof. (p. 241.)

*Exception 7.*—Whenever any person out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the Court has jurisdiction to entertain an action against such first-mentioned person as a co-defendant in the action. (p. 243.)

*Exception 8.*—The Court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action. (p. 247.)

## CHAPTER VI.

### ADMIRALTY JURISDICTION *IN REM*.

RULE 47.—The Court has jurisdiction to entertain an action *in rem* against any ship, or *res* (such as cargo) connected with a ship, if

- (1) the action is an admiralty action, and
- (2) the ship or *res* is in England, or within three miles of the coast of England,

and not otherwise. (p. 251.)

## CHAPTER VII.

## JURISDICTION IN RESPECT OF DIVORCE—DECLARATION OF NULLITY OF MARRIAGE—AND DECLARATION OF LEGITIMACY.

## I. DIVORCE.

## (A) WHERE COURT HAS JURISDICTION.

RULE 48.—The Court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.

This jurisdiction is not affected by

- (1) the residence of the parties, or
- (2) the allegiance of the parties, or
- (3) the domicile of the parties at the time of the marriage, or
- (4) the place of the marriage, or
- (5) the place where the offence in respect of which divorce is sought, is committed.

In this Digest the term “marriage” means the voluntary union for life of one man and one woman to the exclusion of all others. (p. 256.)

## (B) WHERE COURT HAS NO JURISDICTION.

RULE 49.—Subject to the possible exception hereinafter mentioned, the Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings. (p. 261.)

*Exception.*—In the following circumstances, that is to say :—

- (1) Where a husband has—
  - (a) deserted his wife, or
  - (b) so conducted himself towards her that she is justified in living apart from him; *and*
- (2) the parties have up to the time of such desertion or justification been domiciled in England; *and*
- (3) the husband has after such time acquired a domicile in a foreign country, but the wife has continued resident in England;

the Court (*semble*) has, on the petition of the wife, jurisdiction to grant a divorce. (p. 263.)

*Judicial Separation and Restitution of Conjugal Rights.*

RULE 50.—The Court has jurisdiction to entertain a suit, for judicial separation or for the restitution of conjugal rights when both the parties thereto are at the commencement of the suit resident in England.

Provided that—

- (1) the residence need not amount to domicile, but must be
  - more permanent than mere presence in England on a visit or on a journey;
- (2) the residence in England of one only of the parties (*semble*) is not sufficient to give jurisdiction. (p. 265.)

## II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 51.—The Court has jurisdiction to entertain a suit for the declaration of the nullity of any existing marriage—

- (1) where the marriage was celebrated in England, or
- (2) where the respondent is resident in England, not on a visit as a traveller, and not having taken up that residence for the purpose of the suit. (p. 268.)

## III. DECLARATION OF LEGITIMACY.

RULE 52.

- (1) Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to the Court for a decree declaring that his marriage was, or is, a valid marriage; and the Court has jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy

of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, is binding to all intents and purposes on the Crown, and on all persons whomsoever.

- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the Court for a decree declaratory of his right to be deemed a natural-born British subject, and the Court has jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just; and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the Court, except as hereinafter mentioned, is valid and binding to all intents and purposes upon the Crown and all persons whomsoever.
- (3) The decree of the Court does not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person, if subsequently proved to have been obtained by fraud or collusion. (p. 271.)

## CHAPTER VIII.

### JURISDICTION IN BANKRUPTCY AND IN REGARD TO WINDING-UP OF COMPANIES.

#### I. BANKRUPTCY.

##### (A) WHERE COURT HAS NO JURISDICTION.

RULE 53.—The Court has no jurisdiction to adjudge bankrupt any debtor who has not committed an act of bankruptcy within the terms of Rule 59.

The term “the Court,” in this Rule and in Rules 54 to 59,



means a Court having jurisdiction in bankruptcy, under the Bankruptcy Act, 1883, and includes

- (1) the High Court, and
- (2) any County Court having jurisdiction in bankruptcy under the said Act. (p. 277.)

RULE 54.—The Court has no jurisdiction to adjudge bankrupt any debtor who is not a debtor subject to the English bankruptcy law.

A debtor is not “a debtor subject to the English bankruptcy law” unless he either

- (1) commits an act of bankruptcy in England, or
- (2) being a British subject [or (*semble*) being domiciled in England], commits an act of bankruptcy out of England. (p. 278.)

RULE 55.—The Court has no jurisdiction (at any rate on a bankruptcy petition being presented by a creditor) to adjudge bankrupt any debtor unless the debtor either

- (1) at the time of the presentation of the petition is domiciled in England, or
- (2) within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England.

Provided that where there is jurisdiction to commit a judgment debtor under the Debtors Act, 1869, s. 5, the Court has jurisdiction even though he is an alien, and

- (a) is not domiciled in England, and
- (b) has not ordinarily resided, or had a dwelling-house or place of business, in England. (p. 283.)

## (B) WHERE COURT HAS JURISDICTION.

### (a) *On Creditor's Petition.*

RULE 56.—Subject to the effect of Rules 54 and 55, the Court, on a bankruptcy petition being presented by a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt) who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the Court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England, or

- (2) by the absence of the debtor from England at the time of the presentation of the petition, or
- (3) by the fact that either the creditor or the debtor is an alien. (p. 288.)

(b) *On Debtor's Petition.*

RULE 57.—The Court has, on a bankruptcy petition being presented by a debtor, alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt. (p. 291.)

RULE 58.—The jurisdiction of the Court to adjudge bankrupt a debtor on the petition of a creditor, or on the petition of the debtor, is not taken away by the fact of the debtor being already adjudged bankrupt by the Court of a foreign country, whether such country do or do not form part of the British dominions. (p. 292.)

(C) WHAT ACTS ARE ACTS OF BANKRUPTCY.

RULE 59.—A debtor commits an act of bankruptcy in each of the following cases [and in no other case] :—

- (a) If, in England, or *elsewhere*, he makes a conveyance or assignment of [the whole of] his property to a trustee or trustees for the benefit of his creditors generally.
- (b) If, in England, or *elsewhere*, he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.
- (c) If, in England, or *elsewhere*, he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon, which would [under any Act of Parliament] be void as a fraudulent preference if he were adjudged bankrupt.
- (d) If, with intent to defeat or delay his creditors, he *does* any of the following things, namely, departs out of England, or, being out of England, remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.
- (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.

- (f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.
- (g) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or by leave of the Court elsewhere, a bankruptcy notice under the Bankruptcy Act, 1883, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained.

Any person who is for the time being entitled to enforce a final judgment is to be deemed a creditor who has obtained a final judgment within the meaning of this Rule.

- (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts. (p. 293.)

## II. WINDING-UP OF COMPANIES.

### (A) WHERE COURT HAS NO JURISDICTION.

RULE 60.—The Court has no jurisdiction to wind up—

- (1) Any company registered in Scotland or in Ireland;
- (2) Any unregistered company having a principal place of business situate in Scotland or in Ireland, but not having a principal place of business situate in England;
- (3) Any unregistered foreign company which, though carrying on business in England, has no office in England;
- (4) Any unregistered company which does not fall within the Companies Act, 1862.

The term "the Court," in this Rule and in Rule 61, means any Court in England having jurisdiction to wind up a company under the Companies Act, 1862, and the Acts amending the same, and includes the High Court and any other Court in England having such jurisdiction. (p. 297.)

(B) WHERE COURT HAS JURISDICTION.

RULE 61.—Subject to the effect of Rule 60, the Court has jurisdiction to wind up—

- (1) Any company registered in England;
- (2) Any unregistered company having a principal place of business or a branch office in England. (p. 300.)

CHAPTER IX.

JURISDICTION IN MATTERS OF ADMINISTRATION  
AND SUCCESSION.

RULE 62.—In this Digest, unless the context or subject-matter otherwise requires,

- (1) "Property" means and includes—
  - (i) any immovable;
  - (ii) any movable.
- (2) "Administrator" includes an executor.
- (3) "Personal representative" includes an administrator, and also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the property of the deceased by way of administration.
- (4) "Foreign personal representative" means the personal representative of the deceased under the law of a foreign country.
- (5) "Administration" means the dealing according to law with the property of a deceased person by a personal representative.
- (6) "Succession" means beneficial succession to the property of a deceased person.
- (7) "Grant" means a grant of letters of administration or of probate of a will.

- (8) "English grant" means a grant made by the Court.  
(9) "Assets" means such property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with. (p. 303.)

(A) ADMINISTRATION.

RULE 63.—The Court has jurisdiction to make a grant in respect of the property of a deceased person, either

- (1) where such property is locally situate in England at the time of his death, or
- (2) where such property has, or the proceeds thereof have, become locally situate in England at any time since his death,

and not otherwise.

The locality of the deceased's property under this Rule is not affected by his domicile at the time of his death. (p. 307.)

(B) SUCCESSION.

RULE 64.—Where the Court has no jurisdiction to make a grant, the Court has no jurisdiction with regard to the succession to the personal property of a deceased person. (p. 317.)

RULE 65.—Where the Court has jurisdiction to make a grant, the Court has, in general, jurisdiction to determine any question with regard to the succession to the assets of a deceased person. (p. 318.)

CHAPTER X.

STAYING ACTION—*LIS ALIBI PENDENS*.

RULE 66.—The Court has jurisdiction to interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceeding.

But this jurisdiction will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious and oppressive. (p. 322.)

SUB-RULE.—The Court has jurisdiction to stay an action as vexatious or oppressive if proceedings are taken in respect of the

same subject and against the same defendant both in the Court and in a Court of a foreign country.

- (1) If such foreign Court is a Court of the United Kingdom or (*semble*) of any country forming part of the British dominions, the plaintiff's proceedings are *prima facie* vexatious.
- (2) If such foreign Court is a Court of any country not forming part of the British dominions, the plaintiff's proceedings are *prima facie* not vexatious. (p. 324.)

## CHAPTER XI.

### EXTRA-TERRITORIAL EFFECT OF ENGLISH JUDGMENT—ENGLISH BANKRUPTCY—ENGLISH GRANT OF ADMINISTRATION.

#### (A) ENGLISH JUDGMENT.

RULE 67.—A judgment of the Court (called in this Digest an English judgment) has, subject to the exception hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law. (p. 328.)

*Exception.*—An English judgment for any debt, damages, or costs may be rendered operative in Ireland or Scotland by registration of a certificate thereof in accordance with the provisions of Rule 104. (p. 328.)

#### (B) ENGLISH BANKRUPTCY AND WINDING-UP OF COMPANIES.

##### I. BANKRUPTCY.

###### (i) *As an Assignment.*

RULE 68.—An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1883 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables (land),

(2) movables,

whether situate in England or elsewhere. (p. 329.)

(ii) *As a Discharge.*

RULE 69.—A discharge under an English bankruptcy from any debt or liability is, in any country forming part of the British dominions, a discharge from such debt or liability wherever or under whatever law the same has been contracted or has arisen. (p. 339.)

## II. WINDING-UP.

RULE 70.—The winding-up of a company impresses the whole of its property with a trust for application in the course of the winding-up, for the benefit of the persons interested in the winding-up, if such persons are subject to the jurisdiction of the Court. (p. 339.)

RULE 71.—An arrangement under the Companies Act, 1862, and the Acts amending the same, which frees a debtor from liability, is not in a British colony a discharge from liability for a debt there incurred. (p. 342.)

## (C) ENGLISH GRANT OF ADMINISTRATION.

RULE 72.—An English grant has no direct operation out of England.

This Rule must be read subject to Rules 76 to 78. (p. 343.)

RULE 73.—An English grant extends to all the movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who has obtained an English grant (who is hereinafter called an English administrator) may

- (1) sue in an English Court in relation to movables of the deceased situate in any foreign country ;
- (2) receive or recover in a foreign country movables of the deceased situate in such country (?). (p. 343.)

RULE 74.—When a person dies domiciled in England, the Courts of any foreign country ought, by means of a grant or otherwise, to enable the English administrator to act as personal representative of the deceased in such foreign country in regard to any movable there situate. (p. 345.)

RULE 75.—The following property of a deceased person passes to the administrator under an English grant :—

- (1) Any property of the deceased which at the time of his death is locally situate in England.

- (2) Any movables of the deceased, or the proceeds of any property of the deceased, which, though not situate in England at the time of the death of the deceased, are received, recovered, or otherwise reduced into possession by the English administrator as such administrator.
- (3) Any movables of the deceased which after his death are brought into England before any person has, in a foreign country where they are situate, obtained a good title thereto under the law of such foreign country (*lex situs*), and reduced them into possession. (p. 346.)

*Extension of English Grant to Ireland and Scotland.*

RULE 76.—An English grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in Ireland, be sealed with the seal of the said Court, and be of the like force and effect, and have the same operation in Ireland, as a grant of probate or letters of administration made by the said Court.

The latter grant is hereinafter referred to as an Irish grant. (p. 350.)

RULE 77.—An English grant made to the administrator of any person duly stated to have died domiciled in England will, on production of the said grant to, and deposition of a copy thereof with, the clerk of the Sheriff Court of the County of Edinburgh, be duly indorsed with the proper certificate by the said clerk and thereupon have the same operation in Scotland as if a confirmation had been granted by the said Court. (p. 351.)

RULE 78.—Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession, *i.e.*, to any part of the British dominions not forming part of the United Kingdom, adequate provision is made for the recognition in that possession of an English grant. (p. 352.)



## PART II.

## JURISDICTION OF FOREIGN COURTS.

## CHAPTER XII.

## GENERAL RULES AS TO JURISDICTION.

RULE 79.—In this Digest

- (1) “Proper Court” means a Court which is authorised by the sovereign, under whose authority such Court acts, to adjudicate upon a given matter.
- (2) “Court of competent jurisdiction” means a Court acting under the authority of a sovereign of a country who, as the sovereign of such country, has, according to the principles maintained by English Courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the Courts of a foreign country “have jurisdiction,” it is meant that they are Courts of competent jurisdiction;
- (ii) it is stated that the Courts of a foreign country “have no jurisdiction,” it is meant that they are not Courts of competent jurisdiction.
- (3) “Foreign judgment” means a judgment, decree, or order of the nature of a judgment (by whatever name it be called) which is pronounced or given by a foreign Court. (p. 354.)

## (A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In Respect of Persons.*

RULE 80.—The Courts of a foreign country have no jurisdiction over, *i.e.*, are not Courts of competent jurisdiction as against

- (1) any sovereign;
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country. (p. 356.)

(ii) *In Respect of Subject-Matter.*

RULE 81.—The Courts of a foreign country have no jurisdiction

- (1) to adjudicate upon the title or the right to the possession, of any immovable not situate in such country, or
- [(2) (*semble*) to give redress for any injury in respect of any immovable not situate in such country (?)]. (p. 357.)

(B) WHERE JURISDICTION DOES EXIST.

RULE 82.—Subject to Rules 80 and 81, the Courts of a foreign country have jurisdiction (*i.e.*, are Courts of competent jurisdiction)—

- (1) in an action or proceeding *in personam* ;
  - (2) in an action or proceeding *in rem* ;
  - (3) in matters of divorce, or having reference to the validity of a marriage ;
  - (4) in matters of administration and succession ;
- to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction. (p. 360.)

CHAPTER XIII.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 83.—In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases :—

- Case 1.*—Where at the time of the commencement of the action the defendant was resident [or present?] in such country, so as to have the benefit, and be under the protection, of the laws thereof.
- Case 2.*—Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.
- Case 3.*—Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, *i.e.*, has precluded himself from objecting thereto—
  - (a) by appearing as plaintiff in the action, or
  - (b) by voluntarily appearing as defendant in such action without protest, or

- (c) by having expressly or impliedly contracted to submit to the jurisdiction of such Courts.  
(p. 361.)

RULE 84.—In an action *in personam* the Courts of a foreign country do not acquire jurisdiction either

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country, or
- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country. (p. 374.)

## CHAPTER XIV.

### JURISDICTION IN ACTIONS *IN REM*.

RULE 85.—In an action or proceeding *in rem* the Courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country. (p. 378.)

## CHAPTER XV.

### JURISDICTION IN MATTERS OF DIVORCE AND AS REGARDS VALIDITY OF MARRIAGE.

#### I. DIVORCE.

##### (A) WHERE COURTS HAVE JURISDICTION.

RULE 86.—The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce.

This Rule applies to

- (1) an English marriage;
- (2) a foreign marriage. (p. 381.)

##### (B) WHERE COURTS HAVE NO JURISDICTION.

RULE 87.—Subject to the possible exception hereinafter mentioned, the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign

country at the commencement of the proceedings for divorce. (p. 384.)

*Exception.*—The Courts of a foreign country, where the parties to a marriage are not domiciled, have jurisdiction to dissolve their marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where, at the time of the proceedings for divorce, the parties are domiciled. (p. 386.)

## II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 88.—The Courts of a foreign country have (*semble*) jurisdiction to declare the nullity of any marriage celebrated in such country (?). (p. 387.)

## CHAPTER XVI.

### JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION.

RULE 89.—The Courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicile of the deceased. (p. 391.)

RULE 90.—The Courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country. (p. 391.)

## CHAPTER XVII.

### EFFECT OF FOREIGN JUDGMENTS IN ENGLAND.

#### I. GENERAL.

##### (i) *No Direct Operation.*

RULE 91.—A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rule 104. (p. 393.)

*(ii) Invalid Foreign Judgments.*

RULE 92.—Any foreign judgment which is not pronounced by a Court of competent jurisdiction is invalid.

Whether a Court which has pronounced a foreign judgment is, or is not, a Court of competent jurisdiction in respect of the matter adjudicated upon by the Court is to be determined in accordance with Rules 79 to 90.

The validity of a foreign judgment is not, in general, affected by the fact that the Court which pronounces the judgment is not a proper Court. (p. 393.)

RULE 93.—A foreign judgment is invalid which is obtained by fraud.

Such fraud may be either

- (1) fraud on the part of the party in whose favour the judgment is given; or
- (2) fraud on the part of the Court pronouncing the judgment. (p. 397.)

RULE 94.—A foreign judgment is, possibly, invalid when the Court pronouncing the judgment refuses to give such recognition to the law of other nations as is required by the principles of private international law (?). (p. 402.)

RULE 95.—A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice (*e.g.*, owing to want of due notice to the party affected thereby). But in such a case the Court is (generally) not a Court of competent jurisdiction. (p. 403.)

RULE 96.—A foreign judgment shown to be invalid under any of the foregoing Rules 92 to 95, is hereinafter termed an invalid foreign judgment. (p. 405.)

RULE 97.—An invalid foreign judgment has (subject to the possible exception hereinafter mentioned) no effect. (p. 405.)

*Exception.*—An invalid foreign judgment *in rem* may possibly have an effect in England as an assignment, though not as a judgment. (p. 406.)

*(iii) Valid Foreign Judgments.*

RULE 98.—A foreign judgment, which is not an invalid foreign judgment under Rules 92 to 95, is valid, and is hereinafter termed a valid foreign judgment. (p. 407.)

RULE 99.—Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid. (p. 407.)

RULE 100.—A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

(1) of fact, or

(2) of law. (p. 407.)

RULE 101.—A valid foreign judgment has the effects stated in Rules 102 to 108; and these effects depend upon the nature of the judgment. (p. 410.)

## II. PARTICULAR KINDS OF JUDGMENTS.

### (A) JUDGMENT *in Personam*.

#### (a) *As Cause of Action*.

RULE 102.—Subject to the possible exception hereinafter mentioned, a valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is

(1) for a debt, or definite sum of money, and

(2) final and conclusive,

but not otherwise.

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given. (p. 411.)

*Exception*.—An action (*semble*) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England (?). (p. 414.)

SUB-RULE.—A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given. (p. 416.)

#### (b) *As Defence*.

RULE 103.—A valid foreign judgment *in personam*, if it is final and conclusive on the merits (but not otherwise), is a good defence to an action for the same matter when either

(1) the judgment was in favour of the defendant, or

(2) the judgment, being in favour of the plaintiff, has been followed by execution or satisfaction. (p. 417.)

(c) *Extension of Certain Judgments in Personam of Superior Court in one Part of United Kingdom to any other Part.*

RULE 104.—A judgment of a Superior Court in any part of the United Kingdom for any debt, damages, or costs, has, on a certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the Court in which the certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration as aforesaid in the Court in which the certificate is registered.

The term “Superior Court” means in this Rule

- (1) as applied to England, the High Court of Justice in England;
- (2) as applied to Ireland, the High Court of Justice in Ireland;
- (3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decret) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland. (p. 419.)

(B) JUDGMENT *in Rem*.

RULE 105.—A valid foreign judgment *in rem* in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced. (p. 423.)

RULE 106.—A valid foreign judgment *in rem* given by a Court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment. (p. 425.)

(C) JUDGMENT, OR SENTENCE, OF DIVORCE.

RULE 107.—A valid foreign judgment, or sentence, of divorce has in England the same effect as a divorce granted by the Court. (p. 425.)

(D) JUDGMENT IN MATTERS OF SUCCESSION.

RULE 108.—A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the Court. (p. 427.)

## CHAPTER XVIII.

EFFECT IN ENGLAND OF FOREIGN BANKRUPTCY;  
FOREIGN GRANT OF ADMINISTRATION.

## (A) FOREIGN BANKRUPTCY.

## I. AS AN ASSIGNMENT.

*Bankruptcy in Ireland or Scotland.*

RULE 109.—An assignment of a bankrupt's property to the representative of his creditors—

(1) under the Irish Bankrupt and Insolvent Act, 1857 (Irish Bankruptcy), or

(2) under the Bankruptcy (Scotland) Act, 1856 (Scotch Bankruptcy),

is, or operates as, an assignment to such representative of the bankrupt's

(i) immovables (land),

(ii) movables,

wherever situate. (p. 429.)

*Bankruptcy in any Foreign Country, except Ireland or Scotland.*

RULE 110.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country not forming part of the United Kingdom, is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England. (p. 430.)

RULE 111.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is domiciled, is, or operates as, an assignment of the movables of the bankrupt situate in England (?). (p. 431.)

RULE 112.—Subject to the effect of Rule 109, an assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is not domiciled, does not operate as an assignment of the movables of the bankrupt situate in England. (p. 433.)

*English and Foreign Bankruptcy.*

RULE 113.—Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such



countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules, operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date. (p. 434.)

## II. AS A DISCHARGE.

RULE 114.—A discharge under the bankruptcy law of any country from any debt or liability is in such country a discharge from such debt or liability, wherever it has been contracted or has arisen. (p. 435.)

RULE 115.—A discharge from any debt or liability under the bankruptcy law of the country where the debt or liability has been contracted or has arisen [or perhaps where it is to be paid or satisfied (?)] is a discharge therefrom in England. (p. 436.)

RULE 116.—Subject to Rule 117, the discharge from any debt or liability under the bankruptcy law of a foreign country where such debt or liability has neither

(1) been contracted or has arisen, nor

(2) is to be paid or satisfied,

is not a discharge therefrom in England. (p. 439.)

RULE 117.—A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under

(1) an English bankruptcy,

(2) an Irish bankruptcy,

(3) a Scotch bankruptcy,

is, in any country forming part of the British dominions, a discharge from such debt or liability wherever, or under whatever law, the same has been contracted or has arisen. (p. 441.)

## (B) FOREIGN GRANT OF ADMINISTRATION.

RULE 118.—A grant of administration, or other authority to represent a deceased person under the law of a foreign country, has no operation in England.

This Rule must be read subject to the effect of Rules 122 to 124. (p. 443.)

RULE 119.—Where a person dies domiciled in a foreign country, leaving movables in England, the Court will (in general) make a grant to his personal representative under the law of such foreign country. (p. 444.)

RULE 120.—A foreign personal representative has (*semble*) a good title in England to any movables of the deceased which—

- (1) if they are movables which can be touched, *i.e.*, goods, he has in any foreign country acquired a good title to under the *lex situs* [and has reduced into possession (P)];
- (2) if they are movables which cannot be touched, *i.e.*, debts or other choses in action, he has in a foreign country acquired a good title to under the *lex situs*, and has reduced into possession. (p. 447.)

RULE 121.—A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

- (1) if the foreign personal representative sends or brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England;
- (2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England. (p. 451.)

*Extension of Irish Grant and Scotch Confirmation to England.*

RULE 122.—An Irish grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said Court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant. (p. 453.)

RULE 123.—A Scotch confirmation of the executor of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposition of a copy thereof with the proper officer of the said Court, be sealed with the seal of the said Court, and have thereupon in England the like force and effect as an English grant. (p. 454.)

*Extension of Colonial Grant to England.*

RULE 124.—Whenever the Colonial Probates Act, 1892, is by Order in Council made applicable to any British possession, *i.e.*, to any part of the British dominions not forming part of the United Kingdom, the grant of probate or letters of administration will, on

- (1) payment of the proper duty, and
- (2) production of the said grant to, and deposition of a copy thereof with, the High Court in England,

be sealed with the seal of the said Court, and thereupon be of the like force and effect, and have the same operation in England, as an English grant. (p. 454.)

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## BOOK III.

## CHOICE OF LAW.

## CHAPTER XIX.

## STATUS.

RULE 125.—Transactions taking place in England are not affected by any status existing under foreign law which either

- (1) is of a kind unknown to English law, or
- (2) is penal. (p. 458.)

RULE 126.—Any status existing under the law of a person's domicile is recognised by the Court as regards all transactions taking place wholly within the country where he is domiciled. (p. 461.)

RULE 127.—In cases which do not fall within Rule 125, the existence of a status existing under the law of a person's domicile is recognised by the Court, but such recognition does not necessarily involve the giving effect to the results of such status. (p. 463.)

## CHAPTER XX.

## STATUS OF CORPORATIONS.

RULE 128.—The existence of a foreign corporation duly created under the law of a foreign country is recognised by the Court. (p. 469.)

RULE 129.—The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs. (p. 469.)

## CHAPTER XXI.

## FAMILY RELATIONS.

## (A) HUSBAND AND WIFE.

RULE 130.—The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England. (p. 472.)

## (B) PARENT AND CHILD.

RULE 131.—The authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England. (p. 472.)

RULE 132.—The rights of a parent domiciled in a foreign country over the movables in England belonging to a minor are, possibly, governed by the law of the parent's domicile, but are more probably governed, while the minor is in England, by the law of England. (p. 473.)

## (C) GUARDIAN AND WARD.

RULE 133.—A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian) has no direct authority as guardian in England; but the Court recognises the existence of a foreign guardianship, and may, in its discretion,

give effect to a foreign guardian's authority over his ward. (p. 475.)

RULE 134.—A foreign guardian has, unless interfered with by the Court, control over the person of his ward while in England. (p. 478.)

RULE 135.—A foreign guardian cannot dispose of movables situate in England belonging to his ward (?). (p. 478.)

#### (D) LEGITIMACY.

RULE 136.—A child born anywhere in lawful wedlock is legitimate. (p. 479.)

RULE 137.—The law of the father's domicile at the time of the birth of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimitas per subsequens matrimonium*).

Case 1.—If both the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the time of the subsequent marriage allow of *legitimitas per subsequens matrimonium*, the child becomes, or may become, legitimate on the marriage of the parents.

Case 2.—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimitas per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

Case 3.—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimitas per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

Provided that a person born out of lawful wedlock cannot be heir to English real estate, nor can anyone, except his issue, inherit English real estate from him. (p. 479.)

#### (E) LUNATIC AND CURATOR, OR COMMITTEE.

RULE 138.—A person appointed by a foreign decree or commission the curator or committee of a lunatic resident in a foreign country (which person is hereinafter called a foreign curator) does

not acquire the right, as such curator, to control the person or deal with the property of the lunatic in England (?). (p. 491.)

RULE 139.—If a foreign curator applies to the Court to have the person of the lunatic delivered to him, or for the payment to him of money belonging to the lunatic, the Court may in its discretion either grant or refuse the application.

“The Court” in this Rule includes any Court or person having the jurisdiction of a Judge in Lunacy. (p. 493.)

## CHAPTER XXII.

### NATURE OF PROPERTY.

RULE 140.—The law of a country where a thing is situate (*lex situs*) determines whether

(1) the thing itself, or

(2) any right, obligation, or document connected with the thing,

is to be considered an immovable or a movable. (p. 497.)

## CHAPTER XXIII.

### IMMOVABLES.

RULE 141.—All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*). (p. 500.)

*Exception 1.*—The effect of a contract with regard to an immovable is governed by the proper law of the contract (?).

The proper law of such contract is, in general, but not necessarily, the law of the country where the immovable is situate (*lex situs*). (p. 510.)

*Exception 2.*—Where there is a marriage contract, or settlement, the terms of the contract or settlement govern the mutual rights of husband and wife in respect of all English immovables (land) within its terms, which are then possessed or are afterwards acquired.

The marriage contract, or settlement, will be construed with reference to the proper law of the contract, *i.e.*, in the absence

of reason to the contrary, by the law of the husband's actual [or intended (?)] domicile at the time of the marriage.

The husband's actual [or intended (?)] domicile at the time of the marriage is hereinafter termed the "matrimonial domicile." (p. 510.)

*Exception 3.*—Where there is no marriage contract or settlement, the mutual rights of husband and wife over English immovables (land), whether possessed at the time of the marriage or acquired afterwards, are (probably) governed by the law of the matrimonial domicile. (p. 512.)

*Exception 4.*—Under Exceptions 1 and 2 to Rule 185 [*i.e.*, under the Wills Act, 1861, sects. 1 and 2], a will made by a *British subject* may, as regards such immovables in the United Kingdom as form part of his personal estate (chattels real), be valid as to form, though not made in accordance with the formalities required by the *lex situs*. (p. 515.)

*Exception 5.*—An assignment of a bankrupt's property to the representative of his creditors under the English, or the Irish, or the Scotch Bankruptcy Acts, is an assignment of the bankrupt's immovables wherever situate. (p. 515.)

*Exception 6.*—The limitation to an action or other proceeding with regard to an immovable is (probably) governed by the *lex fori* (?). (p. 515.)

## CHAPTER XXIV.

### MOVABLES.

#### *Capacity.*

RULE 142.—A person's capacity to assign a movable, or any interest therein, is governed by the law of his domicile (*lex domicilii*) at the time of the assignment (?).

This Rule must be read subject to the effect of Rules 143 and 144. (p. 518.)

#### *Assignment of Movables in Accordance with Lex Situs.*

RULE 143.—An assignment of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*), is valid. (p. 519.)

RULE 144.—An assignment of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid.

Provided that

- (1) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor;
- (2) the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori*. (p. 522.)

RULE 145.—Subject to the exception hereinafter mentioned, and to Rules 143 and 144, the assignment of a movable, wherever situate, in accordance with the law of the owner's domicile is valid. (p. 525.)

*Exception.*—When the law of the country where a movable is situate (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicile (*lex domicilii*) is, if the special form is not followed, invalid. (p. 527.)

## CHAPTER XXV.

### CONTRACTS—GENERAL RULES.

#### (A) *PRELIMINARY.*

RULE 146.—In this Digest, the term “proper law of a contract” means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law, or laws, to which the parties intended, or may fairly be presumed to have intended, to submit themselves. (p. 529.)

RULE 147.—Where any Act of Parliament intended to have extra-territorial operation makes any contract

- (1) valid, or
- (2) invalid,

the validity or invalidity, as the case may be, of such contract must be determined in accordance with such Act of Parliament independently of the law of any foreign country whatever. (p. 530.)



RULE 148.—A contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure. (p. 532.)

(B) *VALIDITY OF CONTRACT.*

(i) *Capacity.*

RULE 149.—Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

- (1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.
- (2) If he has not such capacity by that law, the contract is invalid. (p. 534.)

*Exception 1.*—A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) (?). (p. 538.)

*Exception 2.*—A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*. (p. 540.)

(ii) *Form.*

RULE 150.—Subject to the exceptions hereinafter mentioned, the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*).

- (1) Any contract is formally valid which is made in accordance with any form recognised as valid by the law of the country where the contract is made (which form is, in this Digest, called the local form).
- (2) No contract is valid which is not made in accordance with the local form. (p. 540.)

*Exception 1.*—The formal validity of a contract with regard to an immovable depends upon the *lex situs* (?). (p. 542.)

*Exception 2.*—A contract made in one country in accordance with the local form in respect of a movable situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*). (p. 542.)

*Exception 3.*—Possibly a contract made in one country, but intended to operate wholly in, and to be subject to, the law of another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required or allowed by the law of the country where the contract is to operate, and subject to the law whereof it is made (?). (p. 543.)

*Exception 4.*—In certain cases a bill of exchange may be treated as valid, though it does not comply with the requirements, as to form, of the law of the country where the contract is made. (p. 544.)

(iii) *Essential Validity.*

RULE 151.—The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law of the contract. (p. 545.)

*Exception 1.*—A contract (whether lawful by its proper law or not) is invalid if it, or the enforcement thereof, is opposed to English interests of State, or to the policy of English law, or to the moral rules upheld by English law. (p. 549.)

*Exception 2.*—A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*) (?). (p. 551.)

*Exception 3.*—A contract (whether lawful by its proper law or not) is, in general, invalid in so far as

- (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*); or
- (2) the contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place.

This exception (*semble*) does not apply to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign country not forming part of the British dominions. (p. 553.)

(C) *THE INTERPRETATION AND OBLIGATION OF CONTRACT.*

RULE 152.—The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract. (p. 556.)

*Sub-Rules for determining the Proper Law of a Contract in Accordance with the Intention of the Parties.*

SUB-RULE 1.—When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption. (p. 560.)

SUB-RULE 2.—When the intention of the parties to a contract, with regard to the law governing the contract, is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract. (p. 561.)

SUB-RULE 3.—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect :—

*First Presumption.*—*Primâ facie*, the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*) ; this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

*Second Presumption.*—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*). (p. 563.)

(D) DISCHARGE OF A CONTRACT.

RULE 153.—The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract (?).

- (1) A discharge in accordance with the proper law of the contract is valid.
- (2) A discharge not in accordance with the proper law of the contract is not valid (?). (p. 569.)

## CHAPTER XXVI.

## PARTICULAR CONTRACTS.

*(A) CONTRACTS WITH REGARD TO IMMOVABLES.*

RULE 154.—The effect of a contract with regard to an immovable is governed by the proper law of the contract (?).

The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (*lex situs*). (p. 572.)

*(B) CONTRACTS WITH REGARD TO MOVABLES.*

RULE 155.—The effect of a contract with regard to a movable is governed by the proper law of the contract. (p. 574.)

*(C) CONTRACT OF AFFREIGHTMENT.*

RULE 156.—The term “law of the flag” means the law of the country whereof a ship carries the flag.

When the flag carried by a ship is that of a State including more than one country, the law of the flag means (*semble*) the law of the country where the ship is registered. (p. 575.)

RULE 157.—Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (*i.e.*, a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag.

Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply. (p. 576.)

*Exception.*—The mode of performing particular acts under a contract of affreightment (*e.g.*, the loading or unloading or delivery of goods) may be governed by the law of the country where such acts take place. (p. 579.)

SUB-RULE.—The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag. (p. 579.)

*(D) CONTRACT FOR THROUGH CARRIAGE OF PERSON  
OR GOODS.*

RULE 158.—The effect of a contract for the carriage of person or goods from a place in one country to a place in another is, as to its general incidents, presumably governed by the law of the place where it is made; but, as to transactions taking place in a particular country, may in certain cases be governed by the law of such country. (p. 580.)

*(E) AVERAGE ADJUSTMENT.*

RULE 159.—As amongst the several owners of property saved by a sacrifice, the liability to general average is governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say)—

- (1) when the voyage is completed in due course, by the law of the port of destination, or
- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly broken up and the ship and cargo part company. (p. 583.)

RULE 160.—An underwriter is bound by an average adjustment duly taken according to the law of the place of adjustment. (p. 584.)

RULE 161.—An English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag. (p. 584.)

*(F) PROVISIONS OF BILLS OF EXCHANGE ACT, 1882, AS TO  
CONFLICT OF LAWS.**Bill of Exchange.<sup>1</sup>*

[RULE 162.—Bills of Exchange Act, 1882, s. 2 (part) and s. 4.] In this Act, unless the context otherwise requires:—

- [1] “Acceptance” means an acceptance completed by delivery or notification.
- [2] “Bearer” means the person in possession of a bill or note which is payable to bearer.
- [3] “Bill” means bill of exchange, and “note” means promissory note.

<sup>1</sup> Rules 162—166 are taken verbatim, with the exception of words or figures in square brackets, from the Bills of Exchange Act, 1882.

- [4] "Delivery" means transfer of possession, actual or constructive, from one person to another.
- [5] "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.
- [6] "Indorsement" means an indorsement completed by delivery.
- [7] "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.
- [8] "Person" includes a body of persons, whether incorporated or not.
- [9] "Value" means valuable consideration.
- [10] "Written" includes printed, and "writing" includes print.
- [11] (1) An inland bill is a bill which is or on the face of it purports to be
  - (a) both drawn and payable within the British Islands, or
  - (b) drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

For the purposes of this Act, "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

- (2) Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill. (p. 585.)

[RULE 163.—Bills of Exchange Act, 1882, s. 72.] Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà protest*, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;

- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. (p. 588.)
  - (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill is determined by the law of the place where such contract is made.
- Provided that where an inland bill is indorsed in a foreign country [*i.e.*, a country not forming part of the British Islands], the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom. (p. 592.)
- (3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured. (p. 595.)
  - (4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. (p. 596.)
  - (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. (p. 596.)

[RULE 164.—Bills of Exchange Act, 1882, s. 57.] Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser—
  - (a) The amount of the bill;
  - (b) Interest thereon from the time of presentment

for payment if the bill is payable on demand, and from the maturity of the bill in any other case;

- (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper. (p. 597.)

*Promissory Note.*

[RULE 165.—Bills of Exchange Act, 1882, s. 83 (1).] A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer. (p. 599.)

[RULE 166.—Bills of Exchange Act, 1882, s. 89.]

- (1) Subject to the provisions in this part [*i.e.*, Part IV. of the Bills of Exchange Act, 1882], and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.
- (2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. (p. 600.)



- (3) The following provisions as to bills do not apply to notes ;  
 namely, provisions relating to  
 (a) Presentment for acceptance ;  
 (b) Acceptance ;  
 (c) Acceptance *suprà* protest ;  
 (d) Bills in a set.
- (4) Where a foreign note is dishonoured, protest thereof is unnecessary. (p. 601.)

(G) *NEGOTIABLE INSTRUMENTS GENERALLY.*

RULE 167.—Any instrument for securing the payment of money, *e.g.*, a bill of exchange, or a government bond, whether foreign or English, may be made a negotiable instrument, either

- (1) by custom of the mercantile world in England, which custom may, if well established, be of recent origin, or  
 (2) by Act of Parliament.

A “negotiable instrument” means an instrument for securing the payment of money which has the following characteristics:—

- (a) The property in the instrument, and all the rights under it, pass to a *bonâ fide* holder for value by mere delivery to him.  
 (b) In the hands of such holder, the property in, and the rights under, such instrument are not affected by defects in the title of, or defences available against, the claims of any prior transferor or holder. (p. 601.)

RULE 168.—No instrument, whether English or foreign, is a negotiable instrument in England, unless it is made so either by custom of the mercantile world in England, or by Act of Parliament. (p. 602.)

(H) *INTEREST.*

RULE 169.—The liability to pay interest, and the rate of interest payable in respect of a debt or loan, is determined by the proper law of the contract under which the debt is incurred or the loan is made. (p. 607.)

(I) *CONTRACTS THROUGH AGENTS.*

*Contract of Agency.*

RULE 170.—An agent’s authority, as between himself and his principal, is governed by the law with reference to which the

agency is constituted, which is in general the law of the country where the relation of principal and agent is created. (p. 609.)

*Relation of Principal and Third Party.*

RULE 171.—When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, *i.e.*, the country where the contract is made (*lex loci contractus*). (p. 609.)

## CHAPTER XXVII.

### MARRIAGE.

#### (A) *VALIDITY OF MARRIAGE.*

RULE 172.—Subject to the exceptions hereinafter mentioned, a marriage is valid when

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other,  
*and*
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say):—
  - (i) if the marriage is celebrated in accordance with the local form; or
  - (ii) if the parties enjoy the privilege of extritoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the State to which they belong; or
  - (iii) if the marriage [being between British subjects(?)] is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or
  - (iv) if the marriage is celebrated in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, s. 22, within the lines of a British army serving abroad; or

(v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, by or before a marriage officer (such, for example, as a British ambassador or British consul) within the meaning of, and duly authorised to be a marriage officer under, the said Act. (p. 613.)

*Exception 1.*—A marriage is not valid if either of the parties, being a descendant of George II., marries in contravention of the Royal Marriage Act (12 Geo. III. c. 11). (p. 626.)

*Exception 2.*—A marriage is, possibly, not valid if *either* of the parties is, according to the law of the country where the marriage is *celebrated*, under an incapacity to marry the other. (p. 627.)

RULE 173.—Subject to the exceptions hereinafter mentioned, no marriage is valid which does not comply, as to *both* (1) the capacity of the parties, *and* (2) the form of the marriage, with Rule 172. (p. 628.)

*Exception 1.*—The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is (possibly) not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England. (p. 633.)

*Exception 2.*—A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is of a kind to which our Courts refuse recognition. (p. 634.)

*Exception 3.*—Any marriage is valid which is made valid by Act of Parliament. (p. 635.)

(B) ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF  
MARRIAGE.

RULE 174.—Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband and wife in respect of all movables within its terms which are then acquired or are afterwards acquired. (p. 635.)

SUB-RULE 1.—The marriage contract or settlement will be

construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the contrary, with reference to the law of the matrimonial domicile. (p. 637.)

SUB-RULE 2.—The parties may make it part of the contract or settlement that their rights shall be subject to some other law than the law of the matrimonial domicile, in which case their rights will be determined with reference to such other law. (p. 637.)

SUB-RULE 3.—The law of the matrimonial domicile will, in general, decide whether any particular movable (*e.g.*, any future acquisition) is included within the terms of the marriage contract or settlement. (p. 638.)

SUB-RULE 4.—The effect or construction of the marriage contract or settlement is not varied by a subsequent change of domicile. (p. 639.)

RULE 175.—Where there is no marriage contract or settlement the mutual rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicile, without reference to

- (1) The law of the country where the marriage is celebrated, or where the wife is domiciled before marriage; or
- (2) Any subsequent change of domicile or nationality on the part of the parties to the marriage. (p. 639.)

RULE 176.—The mutual rights of husband and wife in respect of succession to movables on the death of the other are, in so far as they are not determined by any marriage contract or settlement, governed by the law of the deceased's domicile at the time of his or her death. (p. 643.)

## CHAPTER XXVIII.

### TORTS.

RULE 177.—Whether an act done in a foreign country is or is not a tort (*i.e.*, a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*). (p. 645.)

RULE 178.—An act done in a foreign country is a tort, and actionable as such in England, if it is *both*

- (1) wrongful, *i.e.*, not justifiable, according to the law of the foreign country where it was done, *and*
- (2) wrongful, *i.e.*, actionable as a tort, according to English law, *i.e.*, is an act which, if done in England, would be a tort. (p. 645.)

RULE 179.—An act done in a foreign country is not a tort, or actionable as such, in England, if it *either*

- (1) is innocent, *i.e.*, justifiable, according to the law of the country where it was done, *or*
- (2) is an act which, if done in England, would not be actionable as a tort. (p. 647.)

SUB-RULE.—An act done in a foreign country which, though wrongful under the law of that country at the moment when it was done, has since that time been the subject of an Act of Indemnity passed by the legislature of such country, is not a tort. (p. 653.)

## CHAPTER XXIX.

### ADMINISTRATION IN BANKRUPTCY.

RULE 180.—The administration in bankruptcy of the property of a bankrupt which has passed to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*). (p. 655.)

## CHAPTER XXX.

### ADMINISTRATION AND DISTRIBUTION OF DECEASED'S MOVABLES.

#### (A) ADMINISTRATION.

RULE 181.—The administration of a deceased person's movables is governed wholly by the law of the country where the administrator acts, and from which he derives his authority to collect them, *i.e.*, in effect, by the law of the country where the administration takes place (*lex fori*).

Such administration is not affected by the domicile of the deceased.

In this Rule, the term "administration" does not include distribution. (p. 658.)

(B) *DISTRIBUTION.*

RULE 182.—The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death. (p. 661.)

CHAPTER XXXI.

SUCCESSION TO MOVABLES.

(A) *INTESTATE SUCCESSION.*

RULE 183.—The succession to the movables of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born, or
  - (2) he died, or
  - (3) he had his domicile of origin, or
  - (4) the movables are, in fact, situate at the time of his death.
- (p. 664.)

(B) *TESTAMENTARY SUCCESSION.*

(i) *Validity of Will.*

RULE 184.—Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid. (p. 667.)

(ii) *Invalidity of Will.*

RULE 185.—Any will of movables which is invalid according to the law of the testator's domicile at the time of his death on account of—

- (1) the testamentary incapacity of the testator, or
- (2) the formal invalidity of the will (*i.e.*, the want of the formalities required by such law), or

(3) the material invalidity of the will (*i.e.*, on account of its provisions being contrary to such law),  
is (subject to the exceptions hereinafter mentioned, and to the effect of Rule 187) invalid. (p. 669.)

*Exception 1.*—Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either

[1] by the law of the place where the same was made, or

[2] by the law of the place where such person was domiciled when the same was made, or

[3] by the laws then in force in that part [if any] of His Majesty's dominions where he had his domicile of origin. (p. 673.)

*Exception 2.*—Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. (p. 677.)

*SUB-RULE.*—The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate. (p. 678.)

### (iii) *Interpretation of Will.*

*RULE 186.*—Subject to the exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made. (p. 679.)

*Exception.*—Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country. (p. 679.)

*(iv) Effect of Change of Testator's Domicil after Execution of Will.*

RULE 187.—[Subject to the possible exception hereinafter mentioned] no will or other testamentary instrument [whether executed by a British subject or by an alien] shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same. (p. 680.)

*Exception.*—A will which is invalid on account of material invalidity according to the law of the testator's domicil at the time of his death is invalid, although it may have been valid according to the law of the testator's domicil at the time of its execution (?). (p. 686.)

*(C) EXERCISE OF POWER BY WILL.**(i) Capacity.*

RULE 188.—A person may have capacity to exercise by will a power of appointment conferred by an English instrument, although he does not possess testamentary capacity under the law of his domicil.

The term “English instrument” in this Rule, and in the following Rules, means an instrument (*e.g.*, a settlement or a will) which creates a power of appointment and operates under English law. (p. 687.)

*(ii) Formal Validity.*

RULE 189.—A will of movables made in exercise of a power of appointment by will conferred by an English instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good exercise of the power where the will—

(1) complies with any of the following conditions as to form (that is to say)—

(a) where the will is executed in accordance with the form required by the ordinary testamentary law of England, *i.e.* (if the will be made after the end of 1837), by the Wills Act, 1837; or

(b) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicil; or



[(c) where the will is executed in accordance with any form which is valid under the Wills Act, 1861, *i.e.*, where the will is valid either under Exception 1, or Exception 2, to Rule 185, or under Rule 187 (?)], *and*

(2) is executed in accordance with the terms of the power as to execution. (p. 691.)

RULE 190.—Subject to the exception hereinafter mentioned, no will which does not satisfy the requirements of Rule 189 is a valid exercise of a power of appointment by will created by an English instrument. (p. 697.)

*Exception.*—A will executed in accordance with the form required by the Wills Act, 1837, is, so far as regards the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding that it shall have been expressly required, under the instrument creating the power, that a will made in exercise of such power should be exercised with some additional, or other, form of execution or solemnity. (p. 699.)

(iii) *Interpretation.*

RULE 191.—A general bequest contained in a will of movables is to be construed as an exercise of a general power of appointment.

This Rule applies to such bequest in the following cases (that is to say):—

*Case 1.*—Where the will is executed by a testator domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will.

*Case 2.*—Where the will, whatever the domicile of the testator, shows on the face of it his intention that it shall be construed in accordance with the law of England.

[*Case 3.*—Where the will is executed by a testator not domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will (?).] (p. 700.)

(iv) *Material Validity.*

RULE 192.—The operation of the exercise by will of a power of appointment, created either under an English or under a foreign

instrument, depends on the law which governs the operation of the instrument, and not on the law which governs the operation of the will. (p. 705.)

## CHAPTER XXXII.

### PROCEDURE.

RULE 193.—All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest, the term “procedure” is to be taken in its widest sense, and includes (*inter alia*)—

- (1) remedies and process ;
- (2) evidence ;
- (3) limitation of an action or other proceeding ;
- (4) set-off or counter-claim. (p. 708.)

## INTRODUCTION.

My purpose in this Introduction, which forms an integral part of this work, is to deal with three topics: first, the nature of the subject treated of in this Digest, and generally included under the title of the conflict of laws or of private international law; secondly, the proper method for the treatment of this subject; and thirdly, the general principles underlying the rules or maxims which collectively make up this branch of law.

### *I. NATURE OF THE SUBJECT.*

Most of the cases which occupy an English Court are in every respect of a purely English character; the parties are Englishmen, and the cause of action arises wholly in England, as where *A*, a London tradesman, sues *X*, a citizen of London, for the price of goods sold and delivered in London. When this is so, every act done, or alleged to be done, by either of the parties clearly depends for its legal character on the ordinary rules of English law.

Cases, however, frequently come before our Courts which contain some foreign element; the parties, one or both of them, may be of foreign nationality, as where an Italian sues a Frenchman for the price of goods sold and delivered at Liverpool; the cause of action, or ground of defence, may depend upon transactions taking place wholly or in part in a foreign country, as where *A* sues *X* for an assault at Paris, or on a contract made in France and broken in England, or where *X* pleads in his defence a discharge under the French bankruptcy law; the transactions, lastly, in question, though taking place wholly in England, may, in some way, have reference to the law or customs of a foreign country; this is so, for instance, when *A* wishes to enforce the trusts of a

marriage settlement executed in England, but which on the face of it, or by implication, refers to French or Italian law.

Whenever a case containing any foreign element calls for decision, the judge before whom it is tried must, either expressly or tacitly, find an answer to, at least, two preliminary questions.

FIRST QUESTION.—Is the case before him one which any English Court has, according to the law of England, a right to determine? <sup>1</sup>

The primary business of English tribunals is to adjudicate on transactions taking place in England between Englishmen, or at any rate between persons resident in England; or, briefly, to decide English disputes. There clearly may be matters taking place in a foreign country, or between foreigners, with which no English Court has, according to the law of England, any concern whatever; thus no Division of the High Court, and *a fortiori* no other English tribunal, will entertain an action for the recovery<sup>2</sup> of land in any other country than England. When, therefore, a case coming before an English judge contains a foreign element, he must tacitly or expressly determine whether it is one on which he has a right to adjudicate. This first question is a question of jurisdiction (*forum*). -

SECOND QUESTION.—What (assuming the question of jurisdiction to be answered affirmatively) is the body of law with reference to which the rights of the parties are according to the principles of the law of England to be determined? <sup>3</sup>

Is the judge, that is to say, to apply to the matter in dispute (*e.g.*, the right of *A* to obtain damages from *X* for an assault at Paris) the ordinary rules of English law applicable to like transactions taking place between Englishmen in England, or must he, because of the "foreign element" in the case, apply to its decision the rules of some foreign law, *e.g.*, the provisions of French law as to assaults?

This second question is an inquiry not as to jurisdiction, but as to the choice of law (*lex*).<sup>4</sup>

<sup>1</sup> See chaps. iv. to xi., *post*.

<sup>2</sup> *Companhia de Moçambique v. British South Africa Co.*, [1903] A. C. 602.

<sup>3</sup> See chaps. xix. to xxxii., *post*.

<sup>4</sup> The two foregoing questions always require an answer whenever a case contains any foreign element. It is possible that the judge may be called upon to answer a third question, which, however, arises only where one of the parties bases his claim, or defence, upon the decision of a foreign Court, or, in technical language, upon a foreign judgment. See chaps. xii. to xviii., *post*.

Each of these inquiries, be it noted, must be answered by any judge, English or foreign, in accordance with definite principles, and, by an English judge, sitting in an English Court, in accordance with principles or rules to be found in the law of England. These rules make up that department of English law which deals with the conflict of laws, and may be provisionally described as principles of the law of England, governing the extra-territorial operation of law or recognition of rights.<sup>1</sup> This branch of English law is as much part of the law of England as the Statute of Frauds or the Statute of Distributions. The subject, however, with which we are dealing is, partly from ambiguity of language, and partly from other causes, involved in so much obscurity of its own that we may well examine somewhat further into the nature of our topic, and look at the matter from a somewhat different point of view from the side whence we have hitherto regarded it.

The law of every country, as for example of England, consists of all the principles, rules, or maxims enforced by the Courts of that country under the authority of the state.

It makes no difference for our present purpose whether these principles be written or unwritten; whether they be expressed in Acts of Parliament, or exist as customs; whether they are the result of direct legislation, or are created by judicial decisions. Any rule or maxim whatsoever, which, when the proper occasion arises, will be enforced by the Courts of England under the authority of the state, is part of the law of England. Thus the rule that land descends to the heir, derived as it is from the Common Law; the rule that personal property goes to the next of kin, depending as it now does upon the Statute of Distributions; the principle that a simple contract is not valid without a consideration; or the doctrine, created as it is by judicial legislation, that the validity of a marriage ceremony, wherever made, depends on

The question which then arises and forms the third possible preliminary inquiry may be thus stated: Is the case one with which, according to the principles upheld by English Courts, the foreign Court delivering the judgment had a right to deal?

This again is a question of jurisdiction.

For the sake of simplicity it will be well for the moment to leave this third and occasional inquiry as much as possible out of sight, and to confine our attention to the two questions which, whenever a case containing any foreign element comes before an English judge, necessarily demand an answer.

<sup>1</sup> The expression "extra-territorial recognition of rights" as a description of the branch of law known as private international law was first employed by Professor Holland. See Holland, *Jurisprudence* (10th ed.), p. 411. See also p. 15, *post*.

the law of the country where the marriage is celebrated, are each of them, however different in character and origin, rules enforced by English Courts, and therefore each of them both laws and part of the law of England.

The law of England, however, taken in its most extended and most proper sense, may, in common with the law of every civilised country, *e.g.*, of Italy or of France, be divided into two branches.

The first branch of the law of England may be described, if not with absolute precision, yet with sufficient accuracy for our present object, as the body of rules which regulate the rights of the inhabitants of England and determine the legal effect of transactions taking place between Englishmen within the limits of England. Indirectly, indeed, these rules may, under certain circumstances, affect transactions taking place abroad; their direct and immediate effect, however, is to regulate the actions of men and women living in England. They may, therefore, for the sake of distinction from the other branch or portion of English law, be called the "territorial" or "local" law of England. This territorial law constitutes indeed so much the oldest and most important part of English law that it has been constantly taken to be, and treated as, the whole of the law of the land. Blackstone's Commentaries, for example, though written with the avowed object of describing the whole of the "law of England," contain no mention of any rules which do not belong to the territorial or local law. With this branch of the law, important though it be, the writer on the conflict of laws has no direct concern.

The second branch of the law of England consists of rules which do not directly determine the rights or liabilities of particular persons, but which determine the limits of the jurisdiction to be exercised by the English Courts taken as a whole, and also the choice of the body of law, whether the territorial law of England or the law of any foreign country, by reference to which English Courts are to determine the different matters brought before them for decision.

These rules about jurisdiction and about the choice of law, which make up the second branch of the law of England, are directions for the guidance of the judges.

As to purely English transactions no such guidance can be needed. English Courts clearly have jurisdiction in respect of matters taking place within this country, for to determine the legal effect of such matters is the very object for which the Courts are constituted. The legal character, again, of acts done in England

by Englishmen must obviously be determined by reference to the territorial law of England, since the very object for which this law is created is to regulate the actions of Englishmen in England.

The rules therefore in question, since they are inapplicable to purely English transactions, must have reference to cases which contain, or may contain, some foreign element. They are, in fact, directions for the guidance of the judges when called upon to deal with transactions which, either because of the foreign character of one, or of both, of the parties, or because something material to the case has been done, or is intended to be done, in a foreign country, or has been done with reference to some foreign law, may, possibly at least, require for their fair determination, reference to the provisions of some foreign law. If, for the sake of convenience, we dismiss for the moment from our attention all questions of jurisdiction, this second branch of the law of England may be described in the following terms. It is that part of the law of England which provides directions for the judges when called upon to adjudicate upon any question in which the rights of foreigners, or the effect of acts done, or to be done, in a foreign country, or with reference to a foreign law, require determination. These directions determine whether a given class of cases (*e.g.*, cases as to contracts made in foreign countries) must be decided wholly by reference to the territorial law of England, or either wholly, or in part, by reference to the law of some foreign country, *e.g.*, France. Since these directions for the choice of law may provide either that the territorial law of England shall, under certain circumstances, govern acts taking place abroad, *e.g.*, the proper execution of a will made in France, by a testator domiciled in England, or that foreign law shall, under certain circumstances, govern acts done in England, *e.g.*, the proper execution of a will made in England by a testator domiciled in France, they may, as has been already intimated, be described as "rules for determining the extra-territorial operation of law," or better, "the extra-territorial recognition of rights,"<sup>1</sup> and the branch of law with which we are concerned is, if we include within it both rules as to jurisdiction and rules as to the choice of law, nothing else than the subject generally treated of by English and American writers under the title Conflict of Laws, and by Continental authors under the title of Private International Law.

A mastery of this twofold division of the law of England (or for

<sup>1</sup> See Holland, *Jurisprudence* (10th ed.), p. 411.

that matter of any civilised country) puts a student on his guard against an ambiguity of language which, unless clearly perceived, introduces confusion into every discussion concerning the conflict of laws.

The term "law of a given country,"<sup>1</sup> *e.g.*, law of England, or law of France, is an expression which, under different forms, necessarily recurs again and again in every treatise on private international law. It is further an expression which appears to be perfectly intelligible, and therefore not to demand any explanation. Yet, like many other current phrases, it is ambiguous. For the term "law of a given country" has, at least, two meanings. It may mean, and this is its most proper sense, every rule enforced by the Courts of that country. It may mean, on the other hand, and this is a very usual sense, that part of the rules enforced by the Courts of a given country which makes up the "local" or "territorial" law of a country. To express the same thing in a different form, the term "law of a country" may be used as either including the rules for the choice of law, or as excluding such rules and including only those rules or laws which, as they refer to transactions taking place among the inhabitants of a country within the limits thereof, I have called local or territorial law.

This ambiguity may be best understood by following out its application to the expression "law of England."

The term "law of England" may, on the one hand, mean every rule or maxim enforced or recognised by the English Courts, including the rules or directions followed by English judges as to the limits of jurisdiction and as to the choice of law. This is the sense in which the expression is used in the absolutely true statement that "every case which comes before an English Court must be decided in accordance with the law of England." The term "law of England" may, on the other hand, mean, not the whole of the law of England, but the local or territorial law of England excluding the rules or directions followed by English judges as to the limits of jurisdiction or as to the choice of law. This is the sense in which the expression is used in the also absolutely true statements that "the validity of a will executed in England by a Frenchman domiciled in France is determined by English judges not in accordance with the law of England but in accordance with the law of France," or that "a will of freehold lands in England, though executed by a foreigner abroad, will not be valid unless

<sup>1</sup> See chap. i., *post*, and App., Note 1, "Law of a Country, and the *Renvoi*."



executed in conformity with the law of England," *i.e.*, with the provision of the Wills Act, 1837.

Hence the assertion that "while all cases which come for decision before an English Court must be decided in accordance with the law of England, yet many such cases are, and must be, decided in accordance, not with the law of England, but with the law of a foreign country, *e.g.*, France," though it sound paradoxical, or self-contradictory, is strictly true. The apparent contradiction is removed when we observe that in the two parts of the foregoing statement the term law of England is used in two different senses: in the earlier portion it means the whole law of England, in the latter it means the territorial law of England. This ambiguity is made plain to any one who weighs the meaning of the well-known dictum of Lord Stowell with regard to the law regulating the validity of a marriage celebrated in a foreign country. The question, it is therein laid down, "being entertained "in an English Court, it must be adjudicated according to the "principles of English law, applicable to such a case. But the "only principle applicable to such a case by the laws of England "is, that the validity of Miss Gordon's marriage rights must be "tried by reference to the law of the country, where, if they "exist at all, they had their origin. Having furnished this "principle, the law of England withdraws altogether, and leaves "the legal question to the exclusive judgment of the law of "Scotland."<sup>1</sup>

Let it further be borne in mind that the ambiguity affecting the term law of England affects the term law of France, law of Italy, and the like, and that with regard to statements where these terms are used, the reader should always carefully consider whether the expression is intended to include or to exclude the rules followed by the Courts of the given country, *e.g.*, France, as to the choice of law.<sup>2</sup>

The general character of our subject being then understood, there remain several subordinate points which deserve consideration.

*First.* The branch of law containing rules for the selection of law is in England, as elsewhere, of later growth than the territorial law of the land.

<sup>1</sup> *Dalrymple v. Dalrymple* (1811), 2 Hagg. Const. 54, 58, 59, per Lord Stowell, then Sir William Scott. And see *Collier v. Rivaz* (1841), 2 Curt. 855, 858, judgment of Sir H. Jenner.

<sup>2</sup> See 1 Williams, *Executors* (10th ed.), pp. 276, 277, for a good statement of this ambiguity with reference to the expression "law of a deceased person's domicil."

The development of rules about the conflict of laws implies both the existence of different countries governed by different laws,—a condition of things which hardly existed when the law of Rome was the law of the civilised world,—and also the existence of peaceful and commercial intercourse between independent countries,—a condition of things which had no continuous existence during the ages of mediæval barbarism.

It was not, therefore, until the development of something like the state of society now existing in modern Europe that questions about the conflict of laws powerfully arrested the attention of lawyers. It is a fact of great significance that the countries where attention was first paid to this branch of law, and where it has been studied with the greatest care, have been countries such as Holland, Germany, Great Britain, or the United States, composed of communities, which, though governed under different laws, have been united by the force either of law or of sentiment into something like one state or confederacy. States of this description, such for example as the United Netherlands, both felt sooner than others the need for giving extra-territorial effect to local laws, and also found less difficulty than did other countries in meeting this necessity; since the local laws which the Courts applied were not in strictness foreign laws, but, from one point of view, laws prevailing in different parts of one state. In this matter the history of France supplies one of these instructive exceptions which prove the rule. France was never a confederacy, but the provinces of the monarchy were governed by different laws. Hence the call for determining the extra-provincial effect of customs raised judicial problems about the choice of law. It is also noteworthy that few English decisions bearing on our subject are of earlier date than the Union with Scotland. None are known to me earlier than the accession of James I.

*Secondly.* The growth of rules for the choice of law is the necessary result of the peaceful existence of independent nations combined with the prevalence of commercial intercourse. From the moment that these conditions are realised, the judges of every country are compelled by considerations of the most obvious convenience to exercise a choice of law, or, in other words, to apply foreign laws. That this is so may be seen from an examination of the only courses which, when a case involving any foreign element calls for decision, are, even conceivably, open to the Courts of any country forming part of the society of civilised nations.

The necessity for choosing between the application of different

laws might conceivably be avoided by rigid adherence to one of two principles.

The Courts of any country, *e.g.*, of England, might, on the one hand, decline to give any decision on cases involving any foreign element, *i.e.*, cases either to which a foreigner was a party, or which were connected with any transaction taking place wholly, or in part, beyond the limits of England.

No need for a choice of law would then arise, for the Courts would in effect decline to decide any question not clearly governed by the territorial law of England. This course of action would, however, exclude Englishmen no less than foreigners from recourse to English tribunals. For an Englishman who had entered into a contract with a Scotchman at Edinburgh, or with a Frenchman at Paris, would, if the principle suggested were rigidly carried out, be unable to bring an action in the English Courts for a breach of the contract. To which it may be added that, were the same principle adopted by the Courts of other countries, neither party to such a contract would have any remedy anywhere for its breach.

The English Courts might, on the other hand, determine to decide every matter brought before them, whatever the cause of action and wherever it arose, solely with reference to the local law of England, and hence determine the effect of things done in Scotland or in France, exactly as they would do if the transactions had taken place between Englishmen in England.

Difficulties about the choice of law would, by the adoption of this principle, be undoubtedly removed, since the sole rule of selection would be, that the territorial law of England must in all cases be selected, or, in other words, that there must be no choice at all. Gross injustice would, however, inevitably result as well to Englishmen as to foreigners. The object of a legal decision or judgment is to enforce existing rights, or give compensation for the breach thereof, and it is not the object of a legal decision or judgment to create new rights, except in so far as such creation may be necessary for the enforcement or protection of rights already in existence. But to determine the legal effect of acts done in Scotland or in France, *e.g.*, of a contract made between Scotchmen in Edinburgh, solely with reference to the local law of England, would be to confer upon one or other of the parties, or perhaps upon both, new rights quite different from those acquired under the agreement, or, in other words, to fail in the very object which it is sought to attain by means of a judgment. That this

is so becomes even more manifest if we place before our minds a case of which the foreign element consists in the fact that two persons have intended in some transaction to regulate their rights by reference to a foreign law. *A* and *X*, Englishmen, living in England, agree in London that certain property shall be settled, as far as English law allows, in accordance with the rules of French law. If in interpreting the settlement an English judge were to decline to take any notice of the law of France, he would clearly fail in carrying out the intention of the parties, or, in other words, would fail in ensuring to either of them his rights under the settlement.

If, therefore, it is impossible for the Courts of any country, without injustice and damage to natives, no less than to foreigners, either to decline all jurisdiction in respect of foreign transactions, or to apply to such transactions no rules except those of the local law, a consequence follows which has hardly been sufficiently noted. It is this: that the Courts of every civilised country are constrained, not only by logical, but by practical necessity, to concern themselves with the choice of law, and must occasionally give extra-territorial effect now to their own local law, now to the law of some foreign state.

Is, or is not the enforcement of foreign law a matter of "comity"? This is an inquiry which has greatly exercised the minds of jurists. We can now see that the disputes to which it has given rise are little better than examples of idle logomachy. If the assertion that the recognition or enforcement of foreign law depends upon comity means only that the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the state where it is allowed to operate, the statement expresses, though obscurely, a real and important fact. If, on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon comity is meant to imply that, to take a concrete case, when English judges apply French law, they do so out of courtesy to the French Republic, then the term "comity" is used to cover a view which, if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language. The application of foreign law is not a matter of caprice or option; it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants,

whether natives or foreigners. It were well too in this matter to give heed to two observations. The first is that the Courts, *e.g.*, of England, never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws. The second observation is, that disputes about the effect of comity—and the remark applies to other controversies about the conflict of laws—have been confused by mixing together the question what, on a given subject, is the rule, or, in other words, the law which will be enforced by the judges, with the different inquiry, what are the motives which have led judges or legislators to adopt a particular rule as law. Assume, for the sake of argument, the truth of the doctrine that the enforcement of foreign laws depends upon comity. This dogma throws no light whatever on the nature of the rules upheld by English or other Courts as to the enforcement of foreign laws. To know, for example, that the Courts are influenced by considerations of comity is no guide to any one who attempts to answer the inquiry whether the tribunals of a given country accept “domicil,” as do English Courts, or “nationality,” as do Italian Courts, as determining the law which affects the validity of a will.

*Thirdly.* Though the rules as to extra-territorial effect of law enforced by our Courts are part of the law of England, it should be noted that the law of every other civilised country, *e.g.*, of France, of Italy, or of Germany, contains rules for the choice of law, not indeed identical with, but very similar to, the rules for the same purpose to be found in the law of England.

That this should be so is natural.\* In any given case the laws among which a choice may rationally be made are limited in number.<sup>1</sup> The selection of one or more of these laws is not a matter of caprice, but depends upon more or less definite reasons which are likely to influence all Courts and legislators. The grounds, for example, which induce the Courts of England to

<sup>1</sup> They may be reduced to five heads: (1) *Lex personalis*, or “the law of the country to which a person belongs,” either (a) by domicile (*lex domicilii*) or (b) by nationality (*lex higeantia*); (2) *lex actus*, or “the law of the country where a legal act takes place,” of which the *lex loci contractus*, or the law of the place where a contract is made, is a subdivision; (3) *lex loci delicti*, or “the law of the country where a wrong is committed;” (4) *lex loci solutionis*, or “the law of the country where a legal act (payment) is to be performed;” and (5) *lex fori*, or “the law of the country to which a Court belongs in which an action is brought, or other legal proceeding (*e.g.*, administration in bankruptcy) takes place.” Compare Holland, *Jurisprudence* (10th ed.), pp. 403, 404.

determine the formal validity of a contract, by the law of the place where it is made, are likely to weigh with the Courts of France or of Germany. There exists, moreover, a palpable convenience in the adoption by different countries of the same principle for the choice of law. Hence the mere fact that a particular rule for the selection of law has been followed by the French and American Courts is a valid though not absolutely decisive reason in favour of its being adopted by English Courts; and an appreciation of the advantages to be derived from uniformity has undoubtedly influenced both Courts and Legislatures, when called upon to determine in a given class of cases what should be the rule as to the extra-territorial effect of law. Thus has come into existence a body of rules which, though in different countries they exist as laws only by virtue of the law of each particular country, and though they are by no means everywhere identical, exhibit wherever they exist marked features of similarity. This likeness is increased by the fact that the object aimed at by the Courts of different countries, in the adoption of rules as to the extra-territorial effect of law, is everywhere in substance one and the same. This aim is, in the main, to secure the extra-territorial effect of rights. All, or nearly all, the rules as to the choice of law, which are adopted by different civilised countries, are provisions for applying the principle that rights duly acquired under the law of one country shall be recognised in every country. Thus, the law of England and the law of France seek in this respect the same object, viz., the securing that the rights which a man has attained by marriage, by purchase, or otherwise, *e.g.*, in Italy, shall be enforceable and enjoyable by him in England or France, and, conversely, that the rights which he has acquired in England may be enforceable and enjoyable by him in Italy. This community of the aim, pursued by the Courts and Legislatures of different countries, lies at the very foundation of our subject. It is of itself almost enough to explain the great similarity between the rules as to the choice of law adopted by different countries.

*Fourthly.* The department of law, whereof we have been considering the nature, has been called by various names, none of which are free from objection.<sup>1</sup>

By many American writers, and notably by Story, it has been designated as the "conflict of laws." The apparent appropriateness of the name may be best seen from an example of the kind

<sup>1</sup> See Holland, *Jurisprudence* (10th ed.), pp. 406—412, for an account of the various names applied to rules for determining the choice of law.

of case in which a "conflict" is supposed to arise. *H* and *W*, Portuguese subjects, are first cousins. By the law of Portugal they are legally incapable of intermarriage. They come to England and there marry each other in accordance with the formalities required by the English Marriage Acts. Our Courts are called upon to pronounce upon the validity of the marriage. If the law of England be the test the marriage is valid; if the law of Portugal be the test the marriage is invalid. The question at issue, it may be said, is, whether the law of England or the law of Portugal is to prevail? Here we have a conflict, and the branch of law which contains rules for determining it may be said to deal with the conflict of laws, and be for brevity's sake called by that title.

The defect, however, of the name is that the supposed "conflict" is fictitious and never really takes place. If English tribunals decide the matter in hand, with reference to the law of Portugal, they take this course not because Portuguese law vanquishes English law, but because it is a principle of the law of England that, under certain circumstances, marriages between Portuguese subjects shall depend for their validity on conformity with the law of Portugal. Any such expression, moreover, as "conflict," or "collision," of laws has the further radical defect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed is often a matter too plain to admit of doubt. No judge probably ever doubted that the validity of a contract for the purchase and sale of goods between French subjects made at Paris, and performed, or intended to be performed, in France, depends upon the rules of French law. The term "conflict of laws" has been defended on the ground of its applicability, not to any collision between the laws themselves, but to a conflict in the mind of a judge on the question which of two systems of law should govern a given case. This suggestion gives, however, a forced and new sense to a received expression. It also amounts simply to a plea that the term "conflict of laws" may be used as an inaccurate equivalent for the far less objectionable phrase "choice of law."

Modern English authors, and notably Mr. Westlake, have named our subject Private International Law.<sup>1</sup>

<sup>1</sup> For by far the best statement known to me of the view that private international law is in reality one division of international law, see Pillet's most interesting *Principes de Droit International Privé*, chaps. iii. and iv. His argument deserves careful study.

This expression is handy and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign law which prevails in all civilised countries, such as England, France, and Italy. The tribunals of different countries, as already pointed out, follow similar principles in determining what is the law applicable to a given case, and aim at the same result, namely, the recognition in every civilised country of rights acquired under the law of any other country. Hence an action brought to enforce a right acquired under the law of one country (*e.g.*, of France) will in general be decided in the same manner in whatever country it be maintained, whether, that is to say, it be brought in the Courts of England or of Germany. On this fact is based the defence of the name Private International Law. The rules, it may further be said, which the words designate affect the rights of individuals as against one another, and therefore belong to the sphere of "private," not of public, law; and these rules, as they constitute a body of principles common to all civilised countries, may be rightly termed "international."

The term, however, is at bottom inaccurate. The words private international law "should mean, in accordance with that use of "the word 'international' which, besides being well established "in ordinary language, is both scientifically convenient and "etymologically correct, 'a private species of the body of rules "which prevails between one nation and another.' Nothing of "the sort is, however, intended; and the unfortunate employment "of the phrase, as indicating the principles which govern the "choice of the system of private law applicable to a given class of "facts, has led to endless misconception of the true nature of this "department of legal science."<sup>1</sup> Nor does the inaccuracy of the term end here. It confounds two classes of rules which are generically different from each other. The principles of international law, properly so called, are truly "international" because they prevail between or among nations; but they are not in the proper sense of the term "laws," for they are not commands proceeding from any sovereign. On the other hand, the principles of private international law are "laws" in the strictest sense of that term, for they are commands proceeding from the sovereign of a given state, *e.g.*, England or Italy, in which they prevail; but they are not "international," for they are laws which determine the private rights of one individual as against another, and these

<sup>1</sup> Holland, Jurisprudence (10th ed.), p. 410.



individuals may, or may not, belong to one and the same nation. Authors, in short, who like Foelix divide international law into public international law and private international law, use the words "international" and "law" in each of these expressions in a different sense. Such ambiguity of language, unless fully acknowledged, must lead, as it has led, to confusion of thought. Nor is much gained by such an amendment of terminology as is achieved by a transposition of words. The expression "international private law"<sup>1</sup> is no doubt a slight improvement on "private international law," as it points out that the rules which the name denotes belong to the domain of private law. But the name, improve it as you will, has the insuperable fault of giving to the adjective "international" a meaning different from the sense in which it is generally and correctly employed.

Other names for our subject, such as "comity," the "local limits of law," "intermunicipal law," and the like, have not obtained sufficient currency to require elaborate criticism. Their fault is that either they are too vague for the designation of the topic to which they are applied, or else they suggest notions which are inaccurate. Thus the term "comity," as already pointed out, is open to the charge of implying that a judge, when he applies foreign law to a particular case, does so as a matter of caprice or favour, whilst the term "intermunicipal law" can be accurately used only by giving to each half of the word "intermunicipal" a sense which both is unusual and also demands elaborate explanation. A more accurate description of our topic is (it is submitted) "the extra-territorial effect of law," or better, Professor Holland's phrase "the extra-territorial recognition of rights."<sup>2</sup> But such expressions are descriptions, not names. A writer, therefore, called upon to deal with our topic will act wisely in refusing to be tied down to any set form of words. He will, when convenient, use the admittedly inaccurate terms, conflict of laws, or private international law. But he will himself remember, and will attempt to impress upon his readers, that these names are nothing more than convenient marks by which to denote the rules maintained by the Courts of a given country, as to the selection of the system of law which is to be applied to the decision of cases that contain, or may contain, some foreign element, and also the rules maintained by the Courts of a given country, as to the limits of

<sup>1</sup> See Bar, *Das Internationale Privat- und Strafrecht*.

<sup>2</sup> Holland, *Jurisprudence* (10th ed.), p. 411.

the jurisdiction to be exercised by its own Courts as a whole or by foreign Courts.

## II. METHOD OF TREATMENT.

The subject of the conflict of laws has been treated according to two different methods, which may, for the sake of distinction, be termed respectively the "theoretical method" and the "positive method."

The theoretical method has been adopted by a body of Continental writers, among whom by far the most distinguished is still Savigny. These authors differ from each other on many points of importance, but they display two common characteristics.

Starting from the facts that the rules of private international law which prevail in one country, as for example in England, are to a great extent the same as the rules maintained in other countries, as for example in France or Germany, and that, under the influence of modern civilisation, this similarity tends to increase, they consider private international law as constituting in some sense a "common law," tacitly adopted by all civilised nations. They of course do not deny that whatever force this common law possesses within England, or any other country, is derived from the authority of the sovereign thereof. Nor do they overlook the fact that the legislation or judicial decisions of different states deviate more or less from the principles of the supposed common law. Their doctrine is, that such deviations ought to be avoided, that the fundamental principles of private international law can be ascertained by study and reflection, and that the soundness of the rules maintained, say in England, as to the extra-territorial recognition of rights, can be tested by their conformity to, or deviation from, such general principles.

Hence, the next characteristic of the upholders of the theoretical method is agreement in the view, that the object of a writer on the conflict of laws is to discover the principles of this common law of Europe, and, starting from some one principle, as, for example, that we must "discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat);"<sup>1</sup> or that "the local law should be always applied by which vested rights are kept intact;"<sup>2</sup> or that "every

<sup>1</sup> Savigny, Guthrie's transl. (2nd ed.), p. 133.

<sup>2</sup> Wachter, ii. pp. 1—9.

legal relation must be judged according to the local law of that territory within which it has *come into existence*,"<sup>1</sup> to show how in accordance with the fundamental principle assumed by the writer as the basis of his system, a consistent body of rules is, or might be, adopted by all nations for the determination of the question proper to private international law. What may be the merit or demerit of the fundamental principles laid down by Savigny and others is, be it noted, not at present in question. What requires our attention is the aim proposed to themselves by the class of authors at whose head stands Savigny. Their object is to construct a logically consistent series of rules, which either actually do agree with the rules as to the choice of law upheld in different states, or ought, consistently with sound theory, to prevail in every state.

Authors who pursue this method pass almost imperceptibly from the question what are, to the different inquiry what ought to be, the principles of private international law. Neither Savigny, for example, nor Bar, professes to give to the readers of his treatise a mere enumeration or explanation of the principles, in reference to the extra-territorial recognition of rights, which are actually upheld by the Courts of one, or of all, the states of Europe. What each author attempts to provide is a statement of the principles which ought, as a matter of consistency and expediency, to guide the judges of every country when called upon to deal with a conflict of laws. In this point of view Bar's criticism on Story is full of instruction. "It will often," he writes, "be difficult for a reader to say from Story's discussion of a subject that the decision must, on legal principle, be what he pronounces it to be and none other—(*dass aber die Entscheidung juristisch so und nicht anders ausfallen müsse, wird ihm oft aus Story's Erörterung nicht klar werden*)."<sup>2</sup> The implied censure is just, if Story's aim was to show what ought, on general legal principles, to be the rules governing the conflict of laws. Whether this was his object is questionable. But, be this as it may, Bar's language gives us an accurate conception of the aim pursued by himself and other writers of the same school. They write with a view to show what

<sup>1</sup> Schaffner, s. 32. Compare Savigny, Guthrie's transl. (2nd ed.), pp. 146, 147.

<sup>2</sup> Bar (1st German ed.), s. 19. Compare Bar, *Private International Law*, Gillespie's transl. (2nd ed.), p. 47. The objects of a writer such as Pillet are really (1) to ascertain on what principles (if any) all civilised countries might adopt the same rules of private international law, and (2) to show that these principles have to a considerable extent been more or less consciously followed by the Courts and Legislatures of different civilised countries.

ought of necessity to be in any given case the rule of private international law.

The advantages of the theoretical mode of treatment, when employed by a man of genius, such as Savigny, are in danger of being underrated by English lawyers, to whose whole conception of law it is at bottom opposed. It is therefore a duty to bring these merits into prominence. The two great merits of the method are, first, that it keeps before the minds of students the agreement between the different countries of Europe as to the principles to be adopted for the choice of law, and next, that it directs notice to the consideration which English lawyers are apt to forget; that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice, and is not a matter in any way of mere fancy or precedent. Whether, for example, the legal effect of a given transaction ought to be tested by the *lex actus*, the *lex domicilii*, or the *lex fori*, is a matter admitting of discussion, and which ought to be discussed on intelligible grounds of principle.

The defects of the *a priori* method are unlikely to escape Englishmen. It is not indeed, be it observed, fairly open to the objection which often suggests itself to English critics, that it takes no account of laws as they actually exist. The method is perfectly consistent with careful investigation into the rules as to the conflict of laws which in fact prevail in given countries, *e.g.*, France or the United States, since the actual practice of the Courts tests the correctness of theoretical speculation.

The true charge against the theoretical method is that it leads the writers who adopt it to treat as being law what they think ought to be law, and to lay down for the guidance of the Courts of every country rules which are not recognised as law in any country whatever. "The jurists of Continental Europe," writes Story, "have, with uncommon skill and acuteness, endeavoured to collect principles which ought to regulate this subject among all nations. But it is very questionable whether their success has been at all proportionate to their labour; and whether their principles, if universally adopted, would be found either convenient or desirable, or even just, under all circumstances."<sup>1</sup> This remark exactly hits the weak point of a method which rests on the assumption, common to most German jurists, but hardly to be admitted by an English lawyer, that there exist certain self-

<sup>1</sup> Story, Conflict of Laws, s. 26.

evident principles of right whence can be deduced a system of legal rules, the rightness of which will necessarily approve itself to all competent judges.

The positive method is followed by a whole body of authors, among whom Story is the most celebrated.

These writers, though they do not always quite consistently adhere to their own method, treat the rules of private international law in the main as part of the municipal law of any given country, *e.g.*, England or Italy, where they are enforced.

This school starts from the fact that the rules for determining the conflict of laws are themselves "laws" in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced. Story, therefore, and Foelix do not practically concern themselves with any common law of Europe, but make it the object of their labours to ascertain what is the law of a given country with regard to the extra-territorial operation of rights. A writer of this class may with perfect consistency either limit his inquiries to the law of one country only, as for instance of England, or may extend his investigations to the ascertainment of the laws (with reference of course to his special topic) of Italy, of France, or of all the countries making up the civilised world. This, it may be added, is the course actually adopted by Foelix, who, though writing with primary reference to the law of France, also states briefly the rules, with regard to the extra-territorial recognition of rights, to be found in the law of other countries, such as England or Germany. But whatever be the limits imposed on the scope of their inquiries by writers who follow the positive method, the object of their labours is always in character the same. Their aim is to ascertain what are the rules contained in the law of a given country with regard to a special topic, namely, the extra-territorial recognition of rights. Hence it follows that these authors ought not, in so far as they act consistently with their own method, to attempt the deduction of the rules of private international law from certain general and abstract principles, for their aim is to discover not what ought to be, but what *is* the law. Thus the rule of the law of England, that status depends in the main on the law of a person's domicil, and the different rule laid down by the Italian Code, that status depends on the law of a person's state or nation, are not only different from, but in many cases opposed to, each other. Both, therefore, of the rules cannot, it is presumed, be necessary deductions from the same

general principle. Nor can both be articles of any common law of Europe. But to writers who follow the positive method, each rule is equally a part of private international law. They are both rules as to the choice of law: the one belongs to the municipal law of England, the other to the municipal law of Italy.

The merit of this mode of treatment is that it constantly impresses upon the minds both of writers and of readers, the truth of the all-important doctrine that no maxim is a law unless it be part of the municipal law of some given country, and that the proper means for ascertaining what is the law, say of England or France, with respect to the so-called "conflict of laws" is to study the statutory enactments and the judicial decisions which embody the law of England or France. The soundness of this method is shown by the consideration that writers of eminence pursue it in practice, even where they do not accept it in theory. Savigny and Bar have throughout their works chiefly in view the laws of Germany, or at any rate of those states whose jurisprudence has been influenced by Roman law. Westlake and Phillimore almost avowedly base their speculative conclusions on English or American judgments. References to the common law of Europe are, even by authors who regard it as in some sense the source of private international law, introduced mainly when, for want of judicial decisions or of statutory enactments, it is necessary to consider how a case ought to be decided which has not in fact occupied the Courts. Under such circumstances, which are not of rare occurrence, a writer is compelled to consider the question what in conformity with certain admitted principles ought to be the law applicable to a supposed case.

Here we touch on the weak side of the positive method.

It keeps in the background the extent to which civilised nations do in reality recognise certain common principles as properly governing the extra-territorial recognition of rights. It conceals further the fact that the number of well-established rules with regard to the choice of law to be found in the law of England, or of any other country, is small, and that, whenever a case arises falling under no rule prescribed by statute or by judicial precedent, judges must legislate, and do in fact legislate, with an eye to principles which, being adopted in other countries, may, by an allowable fiction, be styled the common law of Europe.

Still, the positive method is, whatever its defects, the mode of treating the rules of private international law which ought to be adopted by any one who endeavours to deal with them as a branch

of the law of England. Consistent adherence to this method, whilst it precludes the writer from the examination of several curious and interesting topics, such as the historical problems connected with the growth of private international law, relieves him from the necessity of justifying the maintenance of one rule rather than another as soon as it is ascertained to be part of the law of England. An expositor or commentator is not required to be an apologist. The systematic attempt, however, to state what the law is, is in no way inconsistent with an explanation of the grounds on which a rule rests. The part of the law of England which regulates the extra-territorial recognition of rights is no mere mass of incoherent maxims; it is rather a system of rules, all of which have a relation to each other. In the ascertainment of these rules, there will moreover be found, as I have already intimated, opportunities for the legitimate application of the theoretical method. Whenever, as often happens, neither the Statute Book nor the Reports contain any authoritative direction for the decision of a particular case, or rather of a particular class of cases, an intelligent inquirer must recur to the judgments of foreign Courts, and especially of American tribunals, and to the doctrines of authors such as Story or Savigny, whose opinions have, in fact, moulded the decisions of English judges. Such reference is justified, not by the fictitious authority of any common law of Europe, but by the consideration that English judges, when acting in a legislative capacity, rightly give weight to the opinion of eminent jurists, and are influenced by the wish to make the practice of our Courts correspond, in a matter which concerns all civilised states, with the practice upheld by foreign tribunals.

The adoption of the positive method fixes the path to be followed by an author whose business it is to determine the principles of English law with regard to the extra-territorial recognition of rights. He should pursue, as far as possible, the course adopted by English judges when it is their duty to decide any question which may raise a, so-called, conflict of laws.

They first consider whether the case falls within the terms of any Act of Parliament. If it does, there is no further room for discussion.

Thus, the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), validates marriages between parties, one of whom is a British subject, when celebrated abroad before a British Consul in the manner prescribed by that Act, and the Wills Act, 1861 (24 & 25 Vict. c. 114), determines the circumstances under which a will of

personalty is valid if executed in foreign parts by a British subject. Cases which fall within either of these statutes are, therefore, decided by our Courts solely and simply by reference to these statutes. The possibility or certainty that French tribunals might deny validity to a marriage celebrated in France in accordance with the Foreign Marriage Act, 1892, or that a French or other foreign Court might treat as void a will which nevertheless satisfied the requirements of 24 & 25 Vict. c. 114, is, as far as our Courts are concerned, an irrelevant consideration. Nor would they pay any attention to the unanimous opinion of jurists that the Foreign Marriage Act, 1892, or the Wills Act, 1861, violated the principles of the common law of Europe.

If a given case does not fall within the terms of an Act of Parliament, the next inquiry for a judge is whether it is covered by any principle to which precedent has given the authority of law. Show the existence of such a principle, and discussion is again closed.

It is now, for example, settled by a series of decisions that the question whether an action on a contract is barred by a statute of limitation must, in an English Court, be determined wholly by reference to the *lex fori*, i.e., the ordinary or territorial law of England. When, therefore, the question is discussed whether the remedy on a foreign contract is barred by lapse of time, our Courts look wholly to the provisions of English statutes of limitations. On the matter referred to, the authority of text-writers and jurists is opposed to the rule established by English decisions. But the rule is now firmly established. It is part of the law of England, and no argument from the authority of Savigny, or of other eminent jurists, would induce an English judge to violate a rule which, were the matter *res integra*, our Courts might hesitate to adopt.

If, lastly, it happen that a case fall neither within the terms of any Act of Parliament, nor under any principle established by authority, English judges (who, under these circumstances, in effect legislate) look for guidance to foreign decisions, to the opinions of jurists, or to arguments drawn from general principles.

Thus, some years ago,<sup>1</sup> the question arose whether a man born illegitimate, but legitimated in Holland by the subsequent inter-

<sup>1</sup> *In re Goodman's Trusts* (1880), 14 Ch. D. 619; (1881), 17 Ch. D. (C. A.) 266. Conf. *Duncan v. Lawson* (1889), 41 Ch. D. 394.



marriage of his parents, could, under the Statute of Distributions, succeed to the personal property of an uncle dying domiciled in England. The Court of Appeal held in effect that the case was not concluded by the terms of the statute, nor by precedent, and, falling back on general grounds of principle, determined that the legitimacy of the claimant depended on the law of his domicile (Holland) at the time of his birth, and that therefore he was, in England, a "legitimate" child, and entitled to succeed to the goods of his uncle.

The matter may thus be summed up: The sources from which to ascertain the law of England with regard to the extra-territorial recognition of rights, or, in other words, with regard to the rules of private international law, are, first, Acts of Parliament; secondly, authoritative decisions or precedents; thirdly, where recourse can be had neither to statutory enactments nor to reported decisions, then such general principles as may be elicited from the judgments of foreign Courts, the opinions of distinguished jurists, and rules prevalent in other countries.

These are the sources to which the judges refer when called upon to ascertain or fix the law. The only sound method for an English lawyer who attempts to write on private international law as part of the law of England is to follow judicial example and look exclusively to the sources of information recognised by the Courts. This, at any rate, is the method pursued throughout the present treatise.

### III. GENERAL PRINCIPLES.

#### *Jurisdiction and Choice of Law.*

GENERAL PRINCIPLE No. I.—Any right<sup>1</sup> which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly

<sup>1</sup> *Semble*, this does not include a right depending solely on the rules of international law. "It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer." *Cook v. Sprigg*, [1899] A. C. 572, 578, judgment of Privy Council; but see 16 L. Q. R. 1, and *Salaman v. Secretary of State for India*, [1906] 1 K. B. (C. A.) 613.

acquired is enforced or, in general, recognised<sup>1</sup> by English Courts.

This proposition is the enunciation of a maxim or the statement of a fact—for it may be considered in either light—which lies at the foundation of the rules for determining the extra-territorial operation of law. Their object and result is to render effective in one country, *e.g.*, England, rights acquired in every other civilised country, *e.g.*, France or Italy. *A*, a Frenchman, marries a Frenchwoman at Paris, and has children by her. He originally acquires under the law of France, but in virtue of the principle we are considering, possesses also in England, the status and the position of a husband and of a father. If again, by sale, gift, descent, or otherwise, he becomes in France the owner of goods which he then brings to England, his rights of ownership obtain acknowledgment here, and he can in an English Court sue any wrongdoer who takes his property away from him. If further, *A* is assaulted by a German in Paris, and, under French law, has a claim to damages for the assault, he can, if he finds the aggressor in England, in general bring an action for the tort<sup>2</sup> in our Courts; and if *A*, instead of suing in England for the wrong, has obtained in a French Court a judgment<sup>3</sup> against the wrongdoer, he can, speaking generally, enforce his claim to be paid the money due under the judgment against the debtor in England. If, lastly, *A* and *X* have entered into a contract in France, and *X* breaks it, *A* can, if he finds *X* in England, bring an action against him for the breach of contract, and for the damage resulting to *A* therefrom; “where,” in short, “rights are acquired under the laws of “foreign states, the law of this country recognises and gives effect “to those rights, unless it is contrary to the law and policy of this “country to do so,”<sup>4</sup> *i.e.*, unless the case falls within General Principle No. II.<sup>5</sup>

To illustrate further, or perhaps to illustrate at all, the application of a principle which is universally recognised may seem to lawyers superfluous. “I confess,” says Lord Halsbury,<sup>6</sup> “I have

<sup>1</sup> This principle must, of course, be understood as limited by the exceptions or limitations contained in Principle No. II.

<sup>2</sup> See chap. xxviii., *post*

<sup>3</sup> See chap. xvii., *post*.

<sup>4</sup> *Hooper v. Gumm* (1867), L. R. 2 Ch. 282, 289, judgment of Turner, L. J.

<sup>5</sup> See p. 33, *post*.

<sup>6</sup> *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, at p. 335, per Lord Halsbury, L. C.

“ been somewhat surprised at the lengthy elaboration of principles  
“ which I should have thought by this time had been so far accepted  
“ as part of the English law that it was not necessary to enter into  
“ so elaborate a consideration of them. That one country will,  
“ under some circumstances, enforce contracts made in another, is a  
“ proposition I should have thought not requiring authority;” and  
the Chancellor’s dictum applies, in principle, not only to the  
enforcement of a contract made abroad, but also to the enforcement  
of any right acquired in a foreign country. To laymen, on the  
other hand, no amount of examples, which could conveniently be  
given, would convey an adequate conception of the frequency with  
which English Courts, as a matter of course and of every-day  
practice, acknowledge the existence of, and enforce, rights acquired  
whether by foreigners or Englishmen, under the laws of foreign  
countries. The recognition of rights acquired under foreign laws  
is a leading principle of modern civilisation; it has, however,  
received its full development only within comparatively recent  
times. For the whole branch of law with which we are concerned  
has, in England at least, come into existence within little more  
than a century. Hence the principle of the general recognition of  
acquired rights will not be found laid down in any of our older  
legal treatises, and it is now far more often tacitly assumed than  
expressly acknowledged as the foundation of judicial decisions.  
It is therefore a principle which requires very careful study, and  
there is little exaggeration in the assertion that, for the proper  
understanding of any sound theory as to the conflict of laws, every  
word of the proposition embodying the principle of the extra-  
territorial recognition of rights deserves attention.

(1) *Right*.—English judges, and the same thing holds good of,  
for instance, French or German judges, never in strictness enforce  
the law of any country but their own. Upon the occasions on  
which they are popularly said to enforce a foreign law, what they  
do, in reality, is, as already pointed out,<sup>1</sup> to enforce not a foreign  
law, but a right acquired under the law of a foreign country. This  
distinction may appear at first sight a useless subtlety, but due  
attention to it removes difficulties which have perplexed both text-  
writers and Courts. At least half of the perplexities which have  
obscured the treatment by jurists of the law as to the enforcement  
of foreign judgments arise from the failure to appreciate this dis-  
tinction. Thus it has been thought an anomaly that the Courts

<sup>1</sup> See p. 11, *ante*.

of one country, *e.g.*, England, should enforce the judgments given by the Courts of another country, *e.g.*, Italy, or, in other words, that tribunals acting under the authority of the King of England should enforce the commands of the King of Italy. What has not been noticed is that when *A* brings in England an action against *X* on an Italian judgment, our Courts are called upon to enforce not the judgment of the Italian Court, *i.e.*, the command of the King of Italy, but the right acquired by *A* under an Italian judgment to the payment of a debt by *X*. The enforcement of such a claim is neither more nor less anomalous than the enforcement by English tribunals of any other right arising under the law of a foreign country. For whether *A* claims from *X* the payment of a debt due under a contract, made and broken in Italy, or whether he claims the payment of money found by an Italian Court to be due from *X* to *A* for such breach of contract, he in either case demands in reality that an English Court should give effect to a right acquired by *A* under Italian law. Once admit the principle that English Courts in general recognise and enforce rights acquired under the law of a foreign country, and it becomes apparent that there is nothing anomalous or exceptional in their enforcement of a right, *e.g.*, to the payment of 20*l.*, acquired under a foreign judgment. The real point, we may observe in passing, which does require explanation is, not the recognition of rights acquired under a foreign judgment, but the fact that, even in the absence of fraud and the like, English Courts, in common with the tribunals of other countries, hold that rights may be acquired under some foreign judgments without having any claim to recognition. It is, in short, not the habitual recognition, but the occasional non-recognition, of rights acquired under foreign judgments which is, apparently at least, anomalous, and therefore needs explanation.<sup>1</sup>

(2) *Acquired*.—The object for which Courts exist is to give redress for the infringement of rights. No Court intends to confer upon a plaintiff new rights, except in so far as new rights may be necessary to compensate for, or possibly to guard against, the infringement of an existing right. The basis of a plaintiff's claim is that, at the moment of his coming into Court, he possesses some right, *e.g.*, a right to the payment of 20*l.*, which has been violated; the bringing of an action implies, in short, the existence of a right of action. When, therefore, *A* applies to an English Court to

<sup>1</sup> As to this, see pp. 29—31, *post*.

enforce a right acquired in France, he must in general show that, at the moment of bringing his action, he possesses a right which is actually acquired under French law, and which he could enforce against the defendant if he sued the defendant in a French Court. *A* complains, for example, of the non-payment of a debt contracted by *X* in Paris, or seeks damages for an assault committed on him by *X* in Paris. To bring himself within the principle we are considering, he must show that his right to payment or to damages is actually acquired. He must show that the debt is due under French law, or that the assault is an offence punishable by French tribunals. English law does not, speaking generally, apply to transactions occurring out of England; hence the foundation of *A*'s claim is that he wishes to enforce rights actually obtained in France, and he will, as a rule, fail to make out his case unless he can show that the grievance of which he complains is recognised as such by French law, or, in other words, unless he can show a right to redress recognised by the law of France.<sup>1</sup>

Whether such a right actually exists, *i.e.*, whether *A* has an "acquired right," is a matter of fact depending upon the law of France and upon the circumstances of the case.

(3) *Duly*.—The word "duly" is emphatic. It fixes in effect the limit to the application of General Principle No. I. This principle is not that all rights in fact acquired under the law of any civilised country are generally enforceable in England, but only that rights which have been, in the opinion of English Courts, properly and rightly acquired, are generally enforceable here. The use of the word "duly" in General Principle No. I., in short, intimates that the mere possession of a right by *A* under the law of a foreign country, *e.g.*, of Italy, is not of itself the foundation for its enforcement, or even of its recognition, by English tribunals. The foundation is its due acquisition under the law of Italy. Thus our Principle implies that an English Court will not give effect to *A*'s undoubted right acquired under Italian law, *e.g.*, to be paid 20% by *X*, unless the right be one which in the opinion of English judges ought to have been acquired by *A*, *i.e.*, unless it has been duly acquired.

What, then, is the test of due acquisition? The simplest answer

<sup>1</sup> This is quite consistent with the rule that the *remedy* for a right acquired under French law may, *e.g.*, under a statute of limitation, be lost in France and exist in England, or *vice versa*. Questions as to procedure do not really depend upon the rights of the parties. No person has a vested interest in the course of procedure. See Wilberforce, *Statute Law*, p. 166.

is that rights actually acquired under Italian or any other foreign law are presumably, and until the contrary be shown, to be considered duly acquired; but that want of due acquisition may arise either from the conduct of the sovereign by whom the right is conferred, or, though this is a rare case, from the conduct of the person, *A*, by whom the right is acquired.

*A*, for example, has under Italian law acquired the rights of a husband with regard to *M*, or has acquired the right to be paid 20% by *X*. The existence of these rights on *A*'s part in Italy is indisputable, and this for the best of all reasons, namely, that if *A* is in Italy the Courts will in fact recognise and enforce his rights and liabilities as *M*'s husband, and if *X* also is in Italy and in possession of property, will enable *A* to obtain payment of the 20% due from *X*. What, then, are the circumstances either in the conduct of the Italian sovereign, or in the conduct of *A* himself, which will lead English Courts to treat the rights undoubtedly acquired by *A* as defective in due acquisition?

First, as to the conduct of the Italian sovereign.

The right conferred by the Italian sovereign and acquired by *A* may lack due acquisition because the right is one which, in the opinion of the English Courts, the King of Italy, acting either as legislator or as judge, has conferred without possessing proper authority to confer it. The Italian sovereign has in the supposed case acted, in the opinion of English Courts, *ultra vires*. The expression *ultra vires* is strictly accurate. A sovereign's authority, in the eyes of other sovereigns and the Courts that represent them, is, speaking very generally, coincident with, and limited by, his power. It is territorial.<sup>1</sup> He may legislate for, and give judgments affecting, things and persons within his territory. He has no authority to legislate for, or adjudicate upon, things or persons (unless they are his subjects) not within his territory.

The Italian, or any other, sovereign may exceed his acknowledged *legislative* authority.

This kind of excess is rare. The laws of a country apply in general solely to transactions taking place within its borders, or, if they have extra-territorial operation, usually affect only a sovereign's own subjects. But a sovereign's authority to legislate for his own territory, and (with certain qualifications) for his own subjects, is undisputed. Still, cases of legislative action which

<sup>1</sup> *Ex parte Blain* (1879), 12 Ch. D. 522; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263. See General Principle No. III., p. 40, *post*.

may be considered *ultra vires* can be found. Thus English Courts do not acknowledge rights which ultimately depend upon the claim of the French sovereign power to determine in accordance with French law the formal validity of a marriage entered into by a French citizen in England.<sup>1</sup> French tribunals do not, as far as French subjects are concerned, admit the validity of marriages celebrated in France under the Foreign Marriage Act, 1892; and there is no reason to doubt that English Courts would be very slow to admit the validity in England of foreign legislation resembling the Foreign Marriage Act, 1892, or of a foreign law framed on the lines of the Royal Marriage Act, 12 Geo. III. c. 11, at any rate, if the parties affected by it were domiciled in England.

The Italian sovereign, again, or any other, may exceed his acknowledged *judicial* authority.

This kind of excess is common. Few things are more disputable than the limits within which the Courts of a country have a right to exercise jurisdiction. The plain truth is—and this holds good of England no less than of other states—that every country claims for its own Courts wider extra-territorial authority than it willingly concedes to foreign tribunals.<sup>2</sup> Hence it constantly happens that rights acquired under foreign judgments are refused enforcement on the ground that they are not “duly” acquired.

X, a Swiss subject, enters into an agreement with A, a French citizen resident in France. X, at the time when the contract is made, is staying at Paris for a week’s visit. He generally lives in England; his domicile is Swiss. A sues X before a French Court for breach of contract. X receives no notice of the action, and is absent during its continuance. A recovers judgment against X for, say, 1,000*l*. He brings an action on the judgment in England; he fails in his action. The ground of the failure is, that the

<sup>1</sup> *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

<sup>2</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155. “We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a Court of the United States, the question for the Court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons.” *Ibid.*, p. 160, *per curiam*. *Schibsby v. Westenholz* affords an example of legislative and judicial excess of authority. The English Courts under an Act of the English Legislature were authorised, and, indeed, bound to exercise a jurisdiction which English judges did not believe that foreign Courts would admit to be within the proper authority of the British sovereign.

English Court denies the jurisdiction of the French Court, or in effect holds that a right certainly acquired under French law has not been "duly" acquired.

*A* is a domiciled Englishman married to *M*; he goes to Germany, stays there a week, obtains a divorce from *M*, and during her lifetime marries *N*. In Germany he is *N*'s lawful husband, but his right to marry her and all rights depending thereupon are in the view of English Courts not duly acquired, and therefore cannot be enforced in England.<sup>1</sup>

Secondly, as to *A*'s own conduct. *A* has acquired a right to the payment of 20*l.* to him by *X* under Italian law, *e.g.*, under an Italian judgment. That his right exists in Italy is indisputable. The right, moreover, is one which the Italian sovereign has full authority to confer. *A*, however, has obtained the judgment by fraud. In this case his right is not "duly" acquired, and, on proof of the fraud, will not be enforced by the English Courts.<sup>2</sup>

(4) *Civilised Country*.—This term is of necessity a vague one; it may for our present purpose be treated as including any of the Christian states of Europe, as well as any country colonised or governed by such European state, at least in so far as it is governed on the principles recognised by the Christian states of Europe.

England, France, Mexico, the United States, and British India, in so far as governed by British law, are civilised countries. Turkey and China are not civilised states within the meaning of this Rule. The reader should, however, note that the proposition on which I am commenting is simply an affirmative and limited statement; it neither affirms nor denies anything as to the recognition of rights acquired under the laws of countries which are not civilised.<sup>3</sup>

The reason why the rule as to the recognition of acquired rights

<sup>1</sup> See *Lolley's Case* (1812), 2 Cl. & F. 567 (n.); *Shaw v. Gould* (1868), L. R. 3 H. L. 55. See further on this subject, General Principle No. III., p. 40, *post*, as to the test of jurisdiction.

<sup>2</sup> See *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. (C. A.) 295; *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310. There are few (if any) cases in which *A*'s conduct militates against the due acquisition of a right conferred by a sovereign who has authority to confer it, except the case of a judgment obtained by fraud. Still other instances are conceivable. If *A* procured by bribery the passing of an Act by an American State Legislature which gave him rights against *X*, it is possible that, on the bribery being proved, English Courts would refuse to enforce the rights given *A* by such Act.

<sup>3</sup> See App., Note 2, "Law governing Acts done in Uncivilised Countries."



is limited, so as to apply to civilised countries only, is that the willingness of one state to give effect to rights gained under the laws of other states depends upon the existence of a similarity in principle between the legal and moral notions prevailing among different communities. Rules of private international law can exist only among nations which have reached a similar stage of civilisation. That English Courts will recognise rights acquired under the law of Italy or of France is certain. That English Courts will recognise rights acquired under the law of China,<sup>1</sup> under the peculiar legislation or customs of the Territory of Utah,<sup>2</sup> or under the customary law of Bechuanaland,<sup>3</sup> is, to say the least, uncertain. The treatment of the rules as to the extra-territorial effect of law is freed from unnecessary perplexity by excluding from it all reference to the question how far English Courts may, or may not, give effect to the laws of non-civilised communities.<sup>4</sup>

(5) *Recognised and enforced*.<sup>5</sup>—The distinction between the recognition and the enforcement of a right deserves notice.

A Court recognises a right when for any purpose the Court treats the right as existing. Thus, if *A*, a Frenchman, marries *M*, a Frenchwoman, in Paris, and they then come to England, our Courts treat acts done by *A* in regard to *M* as lawful because he is her husband which would be unlawful if done by a man not married to *M*. Our Courts therefore recognise *A*'s rights under French law as *M*'s husband. So whenever an English judge considers *A*'s appointment as guardian of *M* by an Italian Court as a reason (though not, it may be, a conclusive reason) for appointing him *M*'s guardian in England, the judge recognises

<sup>1</sup> Conf. *Attorney-General v. Kwok-A-Sing* (1873), L. R. 5 P. C. 179; *Re Tootal's Trusts* (1883), 23 Ch. D. 532.

<sup>2</sup> *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130.

<sup>3</sup> *Bethell v. Hildyard* (1888), 38 Ch. D. 220, with which contrast *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

<sup>4</sup> Our principle is, as I have said, only affirmative, and does not negative the probability of English Courts recognising rights gained under the law of Turkey or Japan. It should be noted, further, that the principle leaves quite untouched the inquiry how far English Courts may apply the law of England to rights which, if they exist at all, arise from transactions taking place in countries which are strictly barbarous. Whether, if *X* assaults *A* within the territory of a petty negro chief, he has a right of action against *X* in the High Court of Justice, is a problem of some curiosity, but its solution does not fall within the scope of our general principle. Compare *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358; [1893] A. C. 602. See App., Note 2, "Law governing Acts done in Uncivilised Countries."

<sup>5</sup> Compare, for this distinction, Piggott, *Foreign Judgments* (2nd ed.), chap. i.

*A*'s rights or status as guardian under Italian law. So, to give another example, a Court recognises *A*'s rights as owner of land in France when treating an agreement made by him in England in reference to such land as a good consideration for a promise made to him by *X*.

A Court enforces a right when giving the person who claims it either the means of carrying it into effect, or compensation for interference with it.

It is plain that while a Court must recognise every right which it enforces, it need not enforce every right which it recognises.

Now English Courts generally recognise rights acquired in a foreign country, and often enforce them. But our Courts constantly recognise rights which they do not enforce. Thus they will treat *A*, a Frenchman, married to *M* in France, as her husband, but it certainly cannot be asserted that they will enforce against *M* all the rights which *A* as her husband may possess against *M* under French law. So again, *A*'s ownership of land in France receives for many purposes legal recognition in England. But no English Court will determine *A*'s title to French land, or attempt to put him into possession of a house in Paris, or give him damages for a trespass on his land at Boulogne.

(6) *English Courts*.—These words are inserted in the proposition under consideration, though it might easily be stated in a more general form, for the sake of emphasising the fact that the principles of private international law are dealt with in this treatise as part of the law of England.

It may be well to note that English Courts expect foreign tribunals to recognise rights acquired under English law, and occasionally attempt by indirect means to enforce such recognition.

Principle No. I., when fully understood, will be seen to be the foundation on which rests, if not strictly the whole, by far the greater part of the rules for determining the extra-territorial effect of law. English Courts do, as a matter of fact, recognise, and to a great extent enforce, rights acquired under the laws of other countries, *e.g.*, France and Italy, and the various rules for dealing with the so-called conflict of laws are mainly rules for determining the law under which a given right is acquired, or the extent to which English Courts shall enforce a right acquired under a foreign law.

The stress laid by me on the recognition given by the Courts of one country to rights which have been acquired, or have vested, under the law of any other civilised country is open to one grave

objection. My doctrine may seem to be opposed to a criticism of Savigny's on the analogous theory that "that local law should "always be applied by which vested rights shall be kept intact."

"This principle," he writes, "leads into a complete circle; for "we can only know what are vested rights if we know beforehand by "what local law we are to decide as to their complete acquisition."<sup>1</sup>

The opposition, however, is only apparent. Savigny is searching for a principle which may enable a judge to say whether a given case is to be determined by the law, for instance, of France or of England. Whether any one such criterion can be found may admit of doubt. What is perfectly clear is that, for the reason stated by Savigny, the principle of the enforcement of vested rights does not supply such a universal test. To admit this, however, is quite consistent with maintaining that this principle does define the object in the main aimed at by rules having reference to the conflict of laws, or to the extra-territorial effect of rights.<sup>2</sup>

The negative side of Principle No. I. is all but self-evident. If the aim of English Courts in maintaining the rules of so-called private international law be the recognition of duly acquired rights, it almost necessarily follows that English Courts will not recognise any right which they do not consider duly acquired.

In the application further of Principle No. I. we must constantly bear in mind that, though the principle is for the sake of clearness stated in an absolute form, it is subject to important exceptions or limitations, the definition whereof is a matter of extreme nicety and difficulty. They are embodied in Principle No. II. Principle No. I., therefore, must always be understood subject to the effect of General Principle No. II.

GENERAL PRINCIPLE No. II.<sup>3</sup>—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country :

<sup>1</sup> Savigny, Guthrie's transl. (2nd ed.), p. 147.

<sup>2</sup> Savigny, I conceive, has underrated the utility of this principle even, for the determination of the law applicable to the solution of particular cases. In hundreds of instances no difficulty exists in fixing what is the country under the law whereof a right (if it exist at all) has vested. *A* sues *X* for the price of goods sold and delivered by *A* to *X* in a shop at Paris; both parties are Frenchmen. The right to the payment of the debt clearly vests (if at all) under French law.

<sup>3</sup> As to the whole of this principle, see especially Savigny, s. 349, Guthrie's transl. (2nd ed.), pp. 76, 77.

(A) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation ;<sup>1</sup>

(B) Where the enforcement of such right is inconsistent with the policy of English law,<sup>2</sup> or with the moral rules upheld by English law,<sup>3</sup> or with the maintenance of English political institutions ;<sup>4</sup>

(C) Where the enforcement of such right involves interference with the authority of a foreign sovereign within the country whereof he is sovereign.<sup>5</sup>

Principle No. II. contains the exceptions to Principle No. I. ; and enumerates in very general terms the rights which, though duly acquired under the law of a foreign country, English Courts will not enforce, or allow to operate in England.

(A) *Inconsistency with Statute of Imperial Parliament.*—If an Act of the Imperial Parliament is intended to have operation in foreign countries, an English Court will as far as possible enforce it, and therefore will not give effect to rights inconsistent with such a statute. Thus the Foreign Marriage Act, 1892,<sup>6</sup> validates marriages made in accordance with its provisions in foreign countries between parties one of whom at least is a British subject. The Act cannot of its own force operate in France, and French judges have treated as invalid marriages between a British subject and a French citizen celebrated in France under a similar enactment. But an English judge must of necessity hold such a

<sup>1</sup> The Foreign Marriage Act, 1892; The Royal Marriage Act, 1772 (see chap. xxvii., *post*) ; The Wills Act, 1861 (see chap. xxxi., *post*).

<sup>2</sup> *Brook v. Brook* (1861), 9 H. L. C. 193 ; *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275, compared with *Pearce v. Brooks* (1866), L. R. 1 Ex. 213. This head is illustrated by every case in which procedure is treated as depending on *lex fori*. See chap. xxxii., *post*.

<sup>3</sup> *Cranston v. Johnston* (1796), 3 Ves. 170 ; 3 R. R. 80 ; *Kaufman v. Gerson*, [1904] 1 K. B. (C. A.) 591.

<sup>4</sup> *Sommersett's Case* (1771), 20 St. Tr. 1 ; *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895 ; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1 ; *The Halley* (1868), L. R. 2 P. C. 193.

<sup>5</sup> See especially *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358 ; [1893] A. C. 602. Hence it is not the duty, as it is not within the power, of an English Court to enforce in a foreign country obedience to the law of such foreign country. "*Morocco Bound*" *Syndicate, Ltd. v. Harris*, [1895] 1 Ch. 534.

<sup>6</sup> See chap. xxvii., Rule 172, p. 613, *post*.

marriage valid. If *A*, a British subject, and *M*, a French citizen, marry in France under the provisions of the Foreign Marriage Act, 1892, and *A* subsequently during *M*'s lifetime marries *N*, the latter marriage may be held valid in France, but English Courts will not admit its validity, and will not therefore in England enforce rights claimed by *A* or his descendants in virtue of the marriage with *N*. So, again, if *D*, a British subject, makes a will at New York which is valid under the Wills Act, 1861,<sup>1</sup> it will be supported as far as the English Courts can do so in England, even though *D* being domiciled in New York, the Courts of that State should hold it invalid for not complying with some provision of New York law; in other words, English Courts will not enforce any rights of *A* acquired under the law of New York inconsistent with the validity of *D*'s will, or, in other words, inconsistent with the provisions of the Wills Act, 1861.

(B) *Inconsistency with Policy of English Law, &c.*—Under this very general head<sup>2</sup> come a variety of instances which it is hard to refer to any narrower class. They have all this one common characteristic, that they are cases in which English Courts refuse to enforce in England rights which conflict with the fundamental ideas on which English law is grounded, or which are inconsistent with the maintenance of English institutions. The expression “policy of English law” is very vague, but a more precise term would hardly include all the cases which it is necessary to cover. The expression, moreover, is familiar to English lawyers. The chief instances which the general head is intended to include may perhaps be enumerated under five classes. It will be found that, in general, the right which English Courts refuse to enforce, on account of its inconsistency with the policy of English law, conflicts either with the *morality* supported by English Courts, the *status* of persons in England, rights with regard to English *land*, English rules of *procedure*, or, lastly, English law as to what constitutes a *tort*.

<sup>1</sup> See chap. xxxi., Exception 1 to Rule 185, *post*.

<sup>2</sup> Under this principle may be brought, not precisely in form but in substance, the anomalous refusal of English Courts to treat as invalid a contract made in violation of a foreign revenue law. (See Bar, Gillespie's transl. (2nd ed.), pp. 290, 560.) In other words, English Courts would not discourage smuggling into or out of another country, when it violated only the laws of such country and might be favourable to English trade. Whether this non-recognition of foreign revenue laws would now be upheld by English Courts is open to question; it certainly applies only to the laws of a strictly “foreign” country, *i.e.*, a country not part of the British dominions.

*Morality.* English Courts refuse to give legal effect to transactions, wherever taking place, which our tribunals hold to be immoral. Thus a promise made in consideration of future illicit cohabitation, or an agreement which, though innocent in itself, is intended by the parties to promote an immoral purpose,<sup>1</sup> or a promise obtained through what our Courts consider duress or coercion,<sup>2</sup> is according to English law based on an immoral consideration. Such a promise or agreement, therefore, even were it valid in the country where it was made, will not be enforced by English judges. The similarity, however, between the moral principles prevailing in all civilised countries is now so great that the instances are of necessity rare in which English tribunals can be asked to treat as immoral transactions which in a foreign country give rise to legal rights.

Note, nevertheless, that English law may forbid the carrying out in England of transactions which our Courts do not hold to be immoral when taking place abroad. When, for example, the usury laws made the taking of interest above five per cent. illegal, it was still possible to recover in England interest above that amount on loans made in India;<sup>3</sup> and not many years have passed since a contract made in Brazil for the sale of slaves, and there legal, was held to give rise to rights enforceable by English Courts.<sup>4</sup>

*Status.*<sup>5</sup> English Courts do not recognise in England any penal (or privative) status arising under a foreign law, as, for example, the status of civil death, or the civil disabilities or incapacities which may be imposed on priests, nuns, Jews, Protestants, slaves, or others, by the law of the country to which they may belong; nor (it would seem) do our Courts recognise in England any status unknown to our law, as, for example, relationship arising from adoption.<sup>6</sup>

This non-recognition, *e.g.*, of a penal status must be confined to its effect in England. Civil death is unknown to English law. But if, under the law of a foreign country where civil death is recognised, the effect of a person's civil death were to transfer his

<sup>1</sup> *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275; *Pearce v. Brooks* (1866), L. R. 1 Ex. 213; *Moulis v. Owen*, [1907] 1 K. B. (C. A.) 746.

<sup>2</sup> *Kaufman v. Gerson*, [1904] 1 K. B. (C. A.) 591. And see App., Note 3, "Case of *Kaufman v. Gerson*."

<sup>3</sup> *Bodily v. Bellamy* (1760), 2 Burr. 1094.

<sup>4</sup> *Santos v. Illidge* (1860), 29 L. J. (C. P.) 348; 8 C. B. N. S. (Ex. Ch.) 861.

<sup>5</sup> See chap. xix., Rule 125, p. 458, *post*.

<sup>6</sup> See, as to adoption, a remarkable American case, *Blythe v. Ayres* (1892), 96 Cal. 532; 102 Cal. 254.

property there situate to his heir, English law would, it is submitted, recognise the legal effect of such transfer, at any rate in the case of a person domiciled in a foreign country, and in England treat the heir as lawful owner of property which he had acquired through the civil death of his relative.

*Land in England.*<sup>1</sup> Rights with regard to English land are as a rule<sup>2</sup> determined wholly by the ordinary local law of England.

*Matters of Procedure.*<sup>3</sup> The rights as respects procedure of the parties to a suit are utterly unaffected by any foreign law. If *A*, a Frenchman, sues *X*, a German, on a contract made in Italy, in the High Court of Justice, he stands, as regards procedure, exactly in the same position as that occupied by Jones, a citizen of London, when he sues Brown, also a Londoner, for the price of goods sold and delivered. To the idea of "procedure," moreover, our Courts give the widest extension. It includes process, evidence, rules of limitation, remedies, methods of execution, and the like. The reason of this is clear. The practice of a Court is determined by the views entertained in the country to which the Court belongs of the right method of compelling the attendance of the parties, of obtaining evidence, and so forth, and the fact that the claim brought before the Court contains a foreign element is no reason why the Court should adopt methods of enforcing the plaintiff's right differing from the methods which the Court, or rather the sovereign under whose authority the Court acts, holds to be best adapted for the purpose in hand. Matters of procedure are in no sense rights of individuals, they are practices of a Court adopted in accordance with the Court's general views of expediency or of justice.

*Torts.* No act done<sup>4</sup> in a foreign country, *e.g.*, Italy, can be sued for as a tort in England unless it both is a wrongful, that is, an unjustifiable, act under the law of Italy, and would also have been a wrong if it had been done in England. *A*, for example, sues *X* in England for a libel published by *X* of *A* in Italy. He must, in order to maintain his action, establish that the defamatory statement is one which is wrongful, or more strictly unjustifiable, by the law of Italy; he must also make out that the statement is

<sup>1</sup> See chap. xxiii., *post*.

<sup>2</sup> To this rule there is a constantly increasing number of exceptions. See App., Note 4, "Decreasing Influence of the *Lex Situs*."

<sup>3</sup> See chap. xxxii., *post*.

<sup>4</sup> See chap. xxviii., *post*.

one which, if published in England, would render *X* liable to proceedings for libel.<sup>1</sup>

This rule is somewhat complicated. It is, however, explainable. Let us follow out our illustration of an action in England by *A* against *X* for a libel published in Italy.

English law does not extend to Italy, and it clearly would be monstrous for English Courts to give damages, *i.e.*, inflict punishment, for an act done in Italy which Italian law holds innocent or, it may be, praiseworthy. It is, therefore, necessary for *A* to show that the transaction in respect of which he claims damages from *X*, is a transaction which, at lowest, is treated as wrongful<sup>2</sup> by Italian law. English Courts, on the other hand, will not give damages for—*i.e.*, in effect punish—acts which English law holds innocent or, it may be, praiseworthy, for to do so would be inconsistent with the moral rules upheld by English law. *A* must, therefore, show that the statement complained of would have been libellous if published in England.

(C) *Interference with Authority of Foreign Sovereign.*—An English Court will not give effect to rights which cannot be enforced without the doing of acts in another country inconsistent with the supremacy of the sovereign thereof.

This is the rational though probably not the historical ground on which our Courts decline to entertain an action with regard to the title to foreign land.

Principle No. II. (C) extends to land which, though within the dominions of the British sovereign, is not within the territorial limits of the jurisdiction of the English Courts, such, for example, as land in Scotland or Canada.

The exceptional cases in which Courts of equity have dealt with rights over foreign<sup>3</sup> land are exceptions which prove or elucidate the rule. The basis of interference by Courts of equity has, mainly at least,<sup>4</sup> been the possibility of acting in England directly upon

<sup>1</sup> See *The Halley* (1868), L. R. 2 P. C. 193; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; Nelson, *Private International Law*, p. 286.

<sup>2</sup> Logically it might seem that in order to make the defamatory statement actionable in England, *A* ought to show that it was actionable, in the strict sense of that word, in Italy, *i.e.*, that in Italy it gave *A* a right of action against *X*. This was at one time the view entertained by eminent English judges. Our Courts have now determined that it is enough if *A* shows that the statement of which he complains is not held justifiable or innocent by the law of Italy. *Machado v. Fontes*, [1892] 2 Q. B. (C. A.) 231; and see further chap. xxviii., *post*.

<sup>3</sup> See term "foreign," pp. 67, 71, *post*.

<sup>4</sup> See, however, *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.



the owner of the land, and of thus indirectly dealing with foreign land without doing any act within the limits of a foreign country.

Principle No. II. contains, as already pointed out, the exceptions to Principle No. I. They are, many of them, both of theoretical and of practical importance. Still, it should be borne in mind that exceptions are exceptional,—a truism which is constantly overlooked,—and are in truth of far less importance than the rule which they modify or limit. As regards the conflict of laws, the essential matter is to keep the mind firmly fixed on the general recognition of vested rights in accordance with or under Principle No. I. It is the basis on which are founded most of the rules of private international law.

Principle No. I. and Principle No. II. are the primary principles of our subject, and apply both to jurisdiction and to choice of law. From these two principles (*i.e.*, from Principle No. I., taken in combination with the exceptions thereto) are derived the four other General Principles treated of in this Introduction; they may, as compared with General Principles No. I. and No. II., be regarded as derivative or secondary principles.

Of these four derivative or secondary principles, two, viz., General Principles Nos. III.<sup>1</sup> and IV.,<sup>2</sup> refer to jurisdiction; they are the principles which in the main determine both the jurisdiction exercised by the High Court itself, and the jurisdiction which, in the opinion of the High Court, is properly exercisable by the Courts of a foreign country. General Principles Nos. III. and IV. may therefore be aptly termed the criteria, or tests, of jurisdiction; they are in effect tests for determining whether the Courts of a particular country are, in a given matter, Courts of competent jurisdiction,<sup>3</sup> and govern the Rules stated in Book II.

<sup>1</sup> See p. 40, *post*.

<sup>2</sup> See p. 44, *post*.

<sup>3</sup> The term "Court of competent jurisdiction" is ambiguous.

(1) It may mean a "Court belonging to a country whose sovereign may, in 'the opinion of the tribunal called upon to decide the matter, rightly determine, or 'adjudicate upon, a given case or class of cases.'"

When used in this sense the term refers to the "extra-territorial," or as it is sometimes called, "international," competence of the sovereign of a particular country, when acting judicially, or, in other words, to the extra-territorial competence of the Courts of that country.

The term Court, or Courts, of competent jurisdiction is, unless the contrary is stated, used throughout this treatise in its extra-territorial sense.

(2) The term may mean a "Court to which the sovereign of a particular country 'has given authority to adjudicate upon a given case or class of cases.'"

When used in this sense the term refers to intra-territorial competence.

Of the four derivative or secondary General Principles already referred to, two, viz., General Principles Nos. V. and VI., apply to the Choice of Law, and govern the rules stated in Book III.

### *Jurisdiction.*<sup>1</sup>

GENERAL PRINCIPLE No. III.—The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i.e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i.e.*, has no right to adjudicate upon) any matter with regard to which he cannot give an effective judgment.<sup>2</sup>

For the proper understanding of this Principle attention should be paid to two preliminary observations.

*First.* Any question about the competence of the Courts of a country is in reality, whatever the form may happen to be under which it calls for judicial decision, a question about the judicial competence of the sovereign of the country. When, for instance, the High Court decides that a Saxon Court is, whatever the authority given it by the King of Saxony, not a Court competent to divorce persons domiciled in England, the High Court in reality determines that the King of Saxony is not, in the opinion of the High Court, competent to divorce married persons who have an English domicil. So, again, where the High Court decides that it has itself, in general, no jurisdiction to divorce persons not domiciled in England, the High Court in reality determines that the English sovereign is not competent, that is, ought not, to divorce married persons not domiciled in England.

There is of course this difference between the two cases. When the High Court is dealing with the jurisdiction, in matters of

With questions of intra-territorial competence this treatise has no concern, and the term Court, or Courts, of competent jurisdiction is not used therein in its intra-territorial sense.

For the further discussion and illustration of the meaning of the term "Court of competent jurisdiction," see pp. 354—356, *post*.

<sup>1</sup> See as to Jurisdiction, chaps. iv.—xviii., *post*.

<sup>2</sup> Compare *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358, especially judgment of Fry, L. J., pp. 407—409. For a similar theory of jurisdiction, though somewhat differently expressed, see 1 Bishop, *Marriage and Divorce*, ss. 14—24.

divorce, exercised by a Saxon tribunal, the Court may, and does, refuse to give effect to any divorce which, in the opinion of the High Court, the King of Saxony, and therefore the tribunal acting under his authority, was not competent to grant. When the High Court, on the other hand, is dealing with the jurisdiction in matters of divorce which the Court itself is called upon to exercise, it must obey the commands of the English sovereign. If, therefore, an Act of Parliament, or some established rule of English law, gives the High Court jurisdiction to divorce persons not domiciled in England, it must exercise the power and perform the duty imposed upon it, even though the Court may be of opinion that the English sovereign ought not to exercise jurisdiction, as regards divorce, over persons not domiciled in England.<sup>1</sup> No Court, in short, can question the competence of the sovereign under whom it acts. This distinction, however, between the attitude of the High Court when dealing with the jurisdiction of foreign Courts and its attitude when dealing with its own jurisdiction is, for our present purpose, of subordinate importance. The High Court is, when dealing with questions of jurisdiction, little fettered by Acts of Parliament, and in the main<sup>2</sup> follows the general principles which commend themselves to our judges. All that need be noted is that every Court, and the High Court is no exception to the rule, naturally tends to claim for itself a jurisdiction wider than it holds to be in principle properly exercisable by other tribunals. Hence the High Court's mode of dealing with foreign judgments is a better test of the doctrine maintained by it as to the proper limits of jurisdiction than are the rules by which it has defined the boundaries of the High Court's own authority.<sup>3</sup>

*Secondly.* An "effective judgment" means a decree which the sovereign, under whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which therefore his Courts can, if he chooses to give them the necessary means, enforce against such person; to look at the same thing from the other side, an effective judgment is a decree which gives to the person who obtains rights under it an actual and not a merely nominal right, that is, a right which, if aided by the sovereign whose Court has delivered the judgment, he can enforce. A judgment which is not "effective" or is "ineffective" means a

<sup>1</sup> See *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1. Compare *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>2</sup> See, however, *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

<sup>3</sup> See R. S. C. 1883, Ord. XI., and App., Note 10, *post*.

decree which the sovereign under whose authority it is delivered has not in fact the power to enforce against the person bound by it, and which therefore the sovereign cannot, even if he choose, give his Court the means of enforcing; to look at the same thing from the other side, an ineffective judgment is one which gives to the person who obtains rights under it a merely nominal right, that is to say, a right which he cannot, even if aided by the sovereign under whose authority the judgment is delivered, actually and in fact exercise. Thus if the King of Italy, or, to use ordinary language, an Italian Court, gives a judgment entitling *A* to the possession of land at Rome which is occupied by *X*, the judgment is effective, since it can clearly, under the authority of the King of Italy, by means of Italian magistrates, policemen, or soldiers, be enforced against *X* in favour of *A*. If, on the other hand, an Italian Court should give a judgment entitling *A* to the possession of land in London occupied by *X*, the judgment is clearly ineffective, for it cannot by the mere power of the King of Italy, his policemen, or his soldiers, be enforced against *X* or in favour of *A*.

If these preliminary observations be borne in mind, the meaning of General Principle No. III. becomes clear. It may be called the "principle of effectiveness," or from another point of view the "test or criterion of effectiveness." However it be named, it amounts simply to this: that the Courts of a country, as representing the sovereign thereof, have a right, in the opinion of English judges, to adjudicate upon any matter with which they have in fact the power to deal effectively, and have not a right to adjudicate upon any matter with which they have not in fact the power to deal effectively.

The "test of effectiveness" may be regarded as an application further of that general recognition of rights duly acquired under the law of any civilised country which is the true basis of all the rules of private international law.<sup>1</sup> These rules exist to ensure the recognition everywhere of rights duly acquired under the law of any civilised country. But the actual acquisition of a right is a matter of fact. A nominal right which cannot be enforced is not in reality acquired. The principle, therefore, that the jurisdiction of a Court is to be recognised then, and then only, when the Court can give an effective judgment is in reality little more than

<sup>1</sup> See General Principle No. I., p. 23, *ante*.

the rule that English judges will treat as acquired under, *e.g.*, an Italian judgment, those rights, and those rights only, which the Courts or, at bottom, the sovereign of Italy can enforce.

SUB-RULE.—When with regard to any matter (*e.g.*, divorce) the Courts of no one country can give a completely effective judgment, but the Courts of several countries can give a more or less effective judgment, the Courts of that country where the most effective judgment can be given have a preferential jurisdiction.

This is a corollary to General Principle No. III. It has not often been distinctly formulated, but it accounts for more than one instance of what may seem an anomalous exercise of jurisdiction.

To understand the bearing of this corollary, let us contrast the effect of a judgment given by an English Court as regards the possession of land in England with a judgment by an English Court divorcing a husband and wife.

The judgment giving possession to *A* of land in London is as effective as the judgment of any Court, or the decree of any sovereign, can by possibility be made. *A* or his representative may, and will, be put into occupation of the land by the servants of the Court, and will not need for the enjoyment of his right as landowner the aid of any foreign tribunal. But if an English Court declares *A* divorced from *M*, the most that such judgment effects is that in England the parties have the rights of unmarried persons. The judgment cannot, of itself, secure that *A* or *M* shall be treated as unmarried in France or Italy, and conversely no sentence of divorce delivered in France can, of itself, secure that the divorced parties shall be treated as unmarried in England. Now the value of a sentence of divorce, given, *e.g.*, in England, depends upon the connection of the parties with England. If they belong to that country, if they habitually reside there, if it is their home or, in technical language, their domicile, then the English sentence of divorce is as effective as the sentence of the Courts of any one country can be. It gives *A* and *M* the status of unmarried people in the country to which they belong, that is to say, in the country where it is, both to them and to the country itself, of most importance that their status as married or unmarried persons should be fixed. If, on the other hand, *A* and *M* are domiciled, say, in New York, the English sentence of

divorce is, comparatively speaking, ineffective. Hence the rule that the Courts of a person's domicile have at any rate jurisdiction, if not exclusive jurisdiction, in matters of divorce;<sup>1</sup> and the same principle is, we shall find, applicable not only to all judgments affecting status, but also to jurisdiction in matters of succession to movable property.<sup>2</sup>

GENERAL PRINCIPLE NO. IV.—The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction,<sup>3</sup> or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction.

This principle may be called the “principle of submission,” or, from another point of view, the “test or criterion of submission.” It applies to every kind of civil jurisdiction. It amounts to this, that a person who voluntarily agrees, either by act or word, to be bound by the judgment of a given Court or Courts has no right to deny the obligation of the judgment as against himself.

To a certain extent Principle No. IV. may be treated as an application, or result, of Principle No. III. A person who agrees to be bound by the judgment of a Court, *e.g.*, by appearing as defendant, does often by this mere fact give the Court the means of making its judgment effective against him. Still, the principle of submission is, it must be admitted, often based upon grounds different from the principle of effectiveness. It is rather a portion, or development, of the rule that a person is bound by his contracts. Submission, it should be noticed, may take place in various ways, *e.g.*, by a party suing as plaintiff, by his voluntarily appearing as defendant, or by his having made it a part of an express or implied contract that he will, if certain questions arise, allow them to be referred for decision to the Courts of a given country.<sup>4</sup>

<sup>1</sup> See chaps. vii. and xv., *post.*

<sup>2</sup> See chap. xvi., *post.*

<sup>3</sup> See chap. iv., Rule 42, and chap. xiii., Rule 83, *post.*

<sup>4</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17.

With the principle of submission, which applies more or less to all actions, we need concern ourselves but slightly. The main point to which attention should be directed is the extent to which the principle of effectiveness applies to different kinds of jurisdiction.

Though General Principles Nos. III. and IV. are (it is submitted) sound, their truth cannot be dogmatically laid down. The doctrine they involve as to the criteria of jurisdiction underlies, it is contended, both the practice of our Courts and judgments or arguments which have met with general approval. But it cannot in the exact form in which it is here presented claim the direct sanction of English judges or of English text-writers. Hence arises the necessity for justifying this doctrine or theory. Its defence rests on a twofold process: first,<sup>1</sup> the proof that the criteria or tests suggested apply, though not always with equal clearness, to the different kinds of jurisdiction which the High Court either itself exercises or concedes to foreign tribunals; and, secondly,<sup>2</sup> the examination of the objections which apparently, at any rate, lie against the validity of the doctrine and of the General Principles in which it is expressed.

Let us then first examine the application of the principles or criteria of jurisdiction to different kinds of actions.

(1) *Actions in rem*.<sup>3</sup>—In such actions jurisdiction admittedly depends primarily upon the *res*, e.g., the ship, being within the control of the Court adjudicating upon the title thereto, or in strictness within the control of the sovereign under whose authority the Court acts.<sup>4</sup>

In other words, the admitted rule as to judgments *in rem* is a direct and obvious application of the principle of effectiveness, and the same remark applies to jurisdiction in respect of immovables, or land, situate in a given territory.<sup>5</sup> Whenever, indeed, a Court is applied to, as, for example, in the old action of ejectment, for the purpose of obtaining from it possession of land, or a determination of the right to the ownership of land, the proceeding is in substance, though it may not be in form, an action *in rem*.

(2) *Actions with regard to divorce and status*.<sup>6</sup>—Jurisdiction in regard to divorce in general depends, according to English law, upon the domicile of the married persons, one of whom seeks a

<sup>1</sup> See pp. 45 to 50, *post*.

<sup>2</sup> See pp. 50 to 58, *post*.

<sup>3</sup> See chaps. vi. and xiv., *post*.

<sup>4</sup> See Story, s. 592; and *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428, 429, language of Blackburn, J. Compare also chap. xiv., Rule 85, and comment thereon, *post*.

<sup>5</sup> See Story, ss. 589—591; and *Rose v. Hamely*, 4 Cranch, 269, 270. See chap. iv., Rules 39, 43; chap. xii., Rule 81; and chap. xiv., *post*.

<sup>6</sup> See chaps. vii. and xv., *post*.

dissolution of the marriage, *i.e.*, upon the domicile of the husband. The Courts of the domicile do possess, and the Courts of any other country, speaking generally, do not possess, jurisdiction to grant divorce.

No doubt there is a great deal which is artificial in the rules for determining a person's domicile.<sup>1</sup> A man, and still more often a woman, may be legally held to have his or her home in a country where he or she does not live, and, it may be, never has lived. Hence there is an apparent unreality about the rule which bases a Court's authority to dissolve a marriage upon the domicile of the parties. Still, in the vast majority of cases, a person's domicile is his actual home; it is the country where he, in fact, lives. Hence, far more often than not, a divorce granted by a Court of a person's domicile is the most effective sentence of divorce which can be attainable. The practice, therefore, of the English Courts in this matter is a distinct application of the principle of effectiveness combined with the corollary thereto. To this we must add the consideration that, in questions concerning divorce and status generally, it is of practical importance that the Courts of some one country should have exclusive jurisdiction. We can therefore see why it is that, assuming the validity of the English doctrine of a man's belonging to the country where he is domiciled, the Courts of the domicile at the time when the proceedings for divorce are taken not only have jurisdiction, but, subject to very limited exceptions, have, according to English law, exclusive jurisdiction in the matter. The same remark applies, speaking in broad terms, to all actions with regard to status. We can also see how it comes to pass that English Courts treat other circumstances, such, for example, as the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence giving rise to divorce is committed, as immaterial in respect of jurisdiction. These circumstances have nothing to do with the effectiveness of the sentence of divorce.

(3) *Actions with Reference to Succession.*<sup>2</sup>—The Courts of a deceased person's domicile are admittedly Courts of competent jurisdiction to determine the devolution, whether by will or otherwise, of the movable property left by the deceased. Here again we have a clear application of the principle of effectiveness.

A person belongs, according to the view of English judges,

<sup>1</sup> See chap. ii., *post*.

<sup>2</sup> See chaps. ix. and xvi., *post*.



to the country where he is domiciled; it is there that he lives, it is there, in the main, that, speaking very generally, his movable property will be found situate. If it be desirable, as would be generally admitted, that the succession to the whole of his movable estate should be determined by some one law, then that law must be the law of the country to which he belongs, *i.e.*, where he dies domiciled. Hence the Courts of a deceased's domicile should certainly be held Courts of competent jurisdiction in regard to succession to movables. Whether they ought to be held to be Courts of exclusive jurisdiction is a somewhat different matter, with which it will be convenient to deal in considering the objections to the doctrine that jurisdiction is based in the main on our two principles.<sup>1</sup>

(4) *Actions in Personam*.<sup>2</sup>—This is the class of actions which presents most difficulty to a student bent on ascertaining the theory of jurisdiction upheld by the High Court. One reason of this is that the Court almost admittedly claims for itself a jurisdiction more extensive than it would concede to foreign tribunals.<sup>3</sup> Another reason is that the judges of the High Court can hardly be said to have propounded any one guiding principle as to jurisdiction *in personam*, or rather, as we shall show later, the single principle which has been judicially put forward, with more or less authority,<sup>4</sup> derives its real meaning from the instances and illustrations of it. For guidance as to the jurisdiction claimed by the Court itself we must look partly to the practice (independently of Acts of Parliament) of the old Courts of Common Law and of Equity, partly to a list of the instances in which the jurisdiction of the High Court has received statutable extension.<sup>5</sup> For guidance as to the jurisdiction conceded to foreign tribunals by the High Court we must look to the, more or less, authoritative enumeration of the cases wherein the judgment of a foreign Court is to be held *primâ facie* binding, as being delivered by a Court of competent jurisdiction.<sup>6</sup> This list, however, does not profess to be exhaustive, nor, except in so far as it may be confirmed by reported decisions, is it of undisputed authority. Our right course is to

<sup>1</sup> See pp. 52—54, *post*.

<sup>2</sup> See chaps. v. and xiii., *post*.

<sup>3</sup> See *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 159.

<sup>4</sup> *Ibid*.

<sup>5</sup> R. S. C. 1883, Ord. XI. r. 1, and see App., Note 10, *post*.

<sup>6</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

take the instances in which the High Court apparently exercises, or concedes, jurisdiction, and show that many of them hold good in principle when tested by our criteria.

The High Court exercises jurisdiction *in personam* both where the defendant is, and often where the defendant is not, in England at the time of the commencement of an action.

*First,—where the Defendant is in England.* The High Court, or rather the Courts of Common Law and of Equity, which for our present purpose make it up, have always claimed jurisdiction *in personam* over a defendant in virtue of the service upon him of the king's writ, and as the writ can be served upon any one in England, and cannot, except under statute, be served upon any one out of England, this has been in effect a claim to jurisdiction based on the presence of a defendant in England. But such jurisdiction, though originating in technical rules of practice, is in reality based upon the principle of effectiveness. Whenever the King of England could serve a defendant in England with the royal writ, or command, the king could, if he chose, make his judgment effective against the defendant.<sup>1</sup>

*Secondly,—where the Defendant is not in England.* The Courts of Common Law and of Equity have never till recent times claimed or exercised, at any rate directly, jurisdiction over a defendant who was not in England at the time for the service of the writ. The test, therefore, of effectiveness has till recently at any rate held good in its negative, no less than in its positive, aspect.

The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission.

But the High Court now, under statutable powers,<sup>2</sup> exercises jurisdiction in several cases in which the defendant is not in England, and cannot therefore be served with a writ in England. In dealing with this matter we may dismiss from consideration all actions which directly or indirectly concern land in England;<sup>3</sup> they are in reality, though not in form, actions *in rem*, and the

<sup>1</sup> See, as to process, 3 Blackstone, cap. xix. pp. 279—292, and note particularly, as to the different modes of compelling appearance, "First Report of Commissioners for Inquiring into the Process, &c. of Pleading in the Supreme Courts of Common Law, 1851," pp. 4—7.

<sup>2</sup> See R. S. C. 1883, Ord. XI. r. 1.

<sup>3</sup> *Ibid.*, r. 1 (a), (b).

jurisdiction of the Court clearly stands the criterion of effectiveness. Two of the other instances in which the jurisdiction of the Court is exercised are: where relief is sought against a person *domiciled*, or *ordinarily resident*, in England;<sup>1</sup> and next, wherever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed.<sup>2</sup>

Here again there is no substantial difficulty in applying the principle of effectiveness. The first of these instances is little more than an extension of the rule that a defendant who is present in England is liable to the jurisdiction of the Court. A person who is domiciled, or is ordinarily resident, in a country is a person against whom a judgment can, if not always yet more often than not, be rendered effective. Something indeed may be said against the admission of domicile as a ground of jurisdiction *in personam*, and this point will be considered in due course.<sup>3</sup> The second of these instances clearly stands the criterion of effectiveness. When an injunction is applied for against something done or to be done in England, the Court is clearly asked to exercise precisely the powers which English Courts, and no others, can effectively exert.

No doubt the High Court does exercise jurisdiction in cases which do not, obviously at least, come within either the principle of effectiveness or the principle of submission, and the existence of these cases<sup>4</sup> is an objection to the soundness of the doctrine propounded in this Introduction. The force of this objection will receive consideration in its proper place. Meanwhile all that need here be insisted upon is that the jurisdiction *in personam* of the High Court, in so far as it is original and independent of statute, rests almost entirely upon one or other of our two principles of jurisdiction, and, in so far as it is statutable, is to a very great extent based on the principle of effectiveness.

The High Court certainly, or all but certainly, concedes jurisdiction to the Courts of a foreign country in the following cases<sup>5</sup> :—

- (i) Where the defendant is at the time of the action being brought resident [present?] in the foreign country.

<sup>1</sup> *Ibid.*, r. 1 (c).

<sup>2</sup> *Ibid.*, r. 1 (f).

<sup>3</sup> See p. 52, *post*.

<sup>4</sup> R. S. C. Ord. XI. r. 1 (e), (g); and compare Ord. XVI. r. 48.

<sup>5</sup> *Schibsby v. Westernholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351. See chap. xiii., *post*.

- (ii) Where the defendant is at the time of the judgment being delivered a subject of the sovereign of the foreign country.
- (iii) Where the party who objects to the jurisdiction has by his conduct precluded himself from objecting to the jurisdiction of the foreign Court.<sup>1</sup>

These are the sole instances in which it is in any degree certain that our judges concede jurisdiction *in personam* to the Courts of a foreign country, and some doubt may even be entertained whether jurisdiction would always be conceded solely on account of the defendant's allegiance.<sup>2</sup>

Now, of these instances, cases i. and ii. clearly come within the principle of effectiveness, whilst case iii. is nothing but the application, or rather the expression, of the principle of submission.

Let us next consider the objections which may fairly be brought against the validity of the proposed criteria of jurisdiction. Our theory of jurisdiction is open to objections of two different kinds.

*First objection.*—English judges, it may be urged, have maintained a different doctrine, for they have based the jurisdiction of a sovereign, when acting as judge, not on his power to enforce his judgments, but on the “duty” of the person affected thereby (speaking generally the defendant) to obey them.

That the judges have used language which apparently supports this objection is true. “We think,” say the Court of Queen's Bench, “that the judgment of a Court of competent jurisdiction “over the defendant imposes a duty or obligation on the defendant “to pay the sum for which judgment is given, which the Courts in “this country are bound to enforce; and consequently that any- “thing which negatives that duty, or forms a legal excuse for not “performing it, is a defence to the action.”<sup>3</sup>

The answer to this objection is that the doctrine judicially laid down does not in any way contradict the principle here contended for. The language of Baron Parke, adopted by the Court of Queen's Bench in the passage just cited, is, when taken alone, too

<sup>1</sup> See chap. xiii., *post*.

<sup>2</sup> *Douglas v. Forrest* (1828), 4 Bing. 686, is the only case known to me which comes near to a decision that allegiance is a basis of jurisdiction. There are, of course, dicta in *Schibsby v. Westenholz*, *Rousillon v. Rousillon*, and perhaps elsewhere, to the effect that the Courts of a country have jurisdiction over a defendant who at the time when the judgment is given is a subject of the sovereign thereof.

<sup>3</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 159, *per curiam*. See *Russell v. Smyth* (1842), 9 M. & W. 819; *Williams v. Jones* (1845), 13 M. & W. 628, 633.

vague to afford a test of jurisdiction. The term "duty" cannot be used in its ethical sense. The moral obligation of a defendant, *X*, to obey the judgment of an Italian Court, ordering him to pay 20*l.* to *A*, depends on many considerations which Courts of law, not being Courts of casuistry, do not attempt to touch, and above all, on the very matter which, in an action on a judgment, cannot be discussed at all, namely, whether *X* does or does not, in fact, owe 20*l.* to *A*. A "duty" from a legal point of view is the correlative to a "right," and the question, therefore, whether *X* is under a legal duty to obey the judgment of the Italian Court is identical with the inquiry whether the King of Italy, acting through his Courts, has a right to command *A* to pay *X* 20*l.*? That this is so is admitted by the very judgment which treats the "duty" of the defendant as a criterion by which to determine the competence of a foreign Court.<sup>1</sup> We are forced, then, to ask, when has a given sovereign, *e.g.*, the King of Italy, the "right" to issue commands to *X*? This is the problem to be solved. Our criteria are an attempt to solve it. The validity of a solution cannot be affected, one way or the other, by stating the problem which the solution is intended to answer. The Court of Queen's Bench does not in fact really rely upon the vague principle that the validity of a foreign judgment depends on the duty of a defendant to obey it. What the judges really do is to enumerate the circumstances under which this duty arises, and to show that, in the particular case, none of the conditions, which create a duty on the part of a defendant to obey, or the right on the part of a sovereign to issue, a judgment against him, exist. The important thing, therefore, to ascertain is whether the principle of effectiveness and the principle of submission do, or do not, include all the conditions under which, according to the judgment of the Court of Queen's Bench, a person is bound, or is under a duty to obey, the commands of a sovereign.

Here we come across another and much more serious objection to the positions which I am concerned to defend.

*Second objection.*—The High Court, it may be urged, claims or concedes jurisdiction under circumstances which cannot be covered by either of our principles of jurisdiction.

The validity of this criticism can be determined only by examining the cases of the exercise of jurisdiction which, apparently at least, fall within neither the principle of effectiveness nor the principle of submission.

<sup>1</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 160, 161.

These anomalous or exceptional cases may be brought under the following heads, to some of which reference has already been made in the foregoing pages.

(1) *Jurisdiction founded upon domicile or ordinary residence.*<sup>1</sup>—That a person should be bound by a judgment because he is domiciled in the country where the Court delivering judgment has authority is, it must be admitted, to a certain degree an anomaly.

In actions having reference to status this anomaly may, as already suggested, be without great difficulty accounted for. The Courts of a man's domicile can give a *more effective* judgment with regard to his status, *e.g.*, on the question whether he is to be held legitimate or not, than the Courts of any other country. That jurisdiction should, therefore, in this case depend upon domicile, is in conformity with the principle of effectiveness and the corollary thereto.

That domicile should be the test of jurisdiction in matters of succession to movable property admits also of explanation. It is true that, if each piece of property be looked at separately, jurisdiction ought to belong, not to the Courts of the deceased's domicile, but to the Courts of the country where each piece of property is situate at the time of his death, for it is clear that it is the Courts of the *situs* which can give the most effective judgment with regard to the possession of property situate within a given territory. But if it be convenient, as it certainly is, that the Courts and the law of some one country should determine the succession to the whole of a deceased's movable property, then it is in accordance with the principle of effectiveness that jurisdiction should belong to the Courts of the deceased's domicile.

From the fact, however, that in matters of succession the power of giving an effective judgment belongs rather to the Courts of the *situs* than to the Courts of the domicile, flow some noteworthy results.

In the first place succession to land is determined by the Courts of the country where the land is situate.<sup>2</sup>

In the second place, in countries such as England, where a distinct difference is drawn between the administration of and the beneficial succession to movables, every matter connected with administration is within the jurisdiction of the Courts of the country where any articles of a deceased's movable property are

<sup>1</sup> See chap. v., Rule 46, Exception 3, p. 229, *post*.

<sup>2</sup> Story, s. 591; Rules 39, 43, 81, 85, *post*.

locally situate.<sup>1</sup> *T*, an intestate, for example, dies domiciled in Portugal, leaving goods, money, &c., in England. The Portuguese Courts indeed are Courts of competent jurisdiction to determine whether *A*, *T*'s natural son, is or is not entitled to succeed to such part of *T*'s money and goods as may remain after the due administration of *T*'s property in England, *e.g.*, the payment of his debts there, and the decision of the Portuguese Courts in the matter of *A*'s claim to succeed will be taken as conclusive by English Courts.<sup>2</sup> But it is to the English Courts, or to persons acting under their authority, that belongs the right and duty of administration. They are in this matter the Courts of competent<sup>3</sup> and exclusive jurisdiction.

In the third place, though, as regards beneficial succession to movables, the Courts of the deceased's domicile are Courts of *competent* jurisdiction, they are not Courts of *exclusively competent* jurisdiction. Thus, though to follow out our supposed case of a Portuguese dying domiciled in Portugal, and leaving movables in England, the Portuguese Courts are competent to determine whether *A* has a right to succeed beneficially to *T*, yet the right and duty of the English Court in "administering the property, "supposing a suit to be instituted for its administration, is to "ascertain who, by the law of the domicile, are entitled [to succeed "to *T*'s property], and, that being ascertained, to distribute the "property accordingly. The duty of administration is to be discharged by the Courts of this country, though in the performance "of that duty they will be guided by the law of the domicile,"<sup>4</sup> and will follow any decision given in the matter, *e.g.*, as to the right of an illegitimate son to succeed, by the Courts of the domicile.<sup>5</sup> The admitted rules, in short, as to jurisdiction in matters of succession, arise not from any opposition to the principle of effectiveness, but from a question how best to apply it to the matter in hand. Look at the property of a deceased as a whole, and the Courts of the country to which he belongs (*i.e.*, according to English law, of his domicile) will appear to be in general the tribunals most capable of giving an effective judgment with

<sup>1</sup> See chap. ix., Rule 63, *post*.

<sup>2</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

<sup>3</sup> Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1, with *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; (1885), 10 App. Cas. 453.

<sup>4</sup> *Enohin v. Wylie* (1862), 10 H. L. C. 13, per Lord Cranworth; cited with approval in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 503, per Lord Selborne.

<sup>5</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

regard to it. Look, however, at his movable property, not as a whole, but as consisting of separate movables, and then it will appear that the Courts of a country where each movable is situate are the tribunals capable of giving the most effective judgment with regard to such movable. Whatever be the most proper application of the principle of effectiveness, the very difficulties felt by the Courts in applying it show that it is the principle by which they are guided in matters of succession.

Why, however, should domicile be a foundation of jurisdiction in personal actions?

The answer apparently is that, until recently, it never has been, according to English law, a ground for jurisdiction. That it has recently been treated as such must be attributed, either to the habit of resting jurisdiction on domicile in matters of status and of succession, or to the fact that, when a man is "domiciled" or "ordinarily resident" in a country, the Courts of that country can, if not always, yet frequently, make a judgment against him effective, with which fact is combined the consideration that a man who has his domicile or ordinary residence, *e.g.*, in England, may perhaps be taken to submit to the jurisdiction of the English Courts. However this may be, the admission ought to be made that, as regards actions *in personam*, it is something of an anomaly that domicile should be made a ground of jurisdiction.

(2) *Jurisdiction founded on place of obligation*.<sup>1</sup>—It is sometimes asserted that the High Court recognises the jurisdiction of the *forum obligationis*, that is, of the Courts of the country where an obligation is incurred, or, in the terms of English law, a cause of action has arisen.<sup>2</sup> For this assertion, however, if made in its full breadth, no decisive authority can be cited. Neither at Common Law nor in Equity did the *mere fact* of a tort having been committed, or of a contract having been made or broken, in England, give the Courts jurisdiction over a defendant not present in England, and there is no reason to suppose that the English Courts have ever conceded to foreign tribunals authority more extensive than that which the English Courts claimed for themselves. At the present moment, moreover, not only is there nothing to show that the commission of a tort,<sup>3</sup> whether in

<sup>1</sup> See chap. v., Rule 46, Exception 5; and compare chap. xiii., Rules 83, 84, *post*.

<sup>2</sup> See *Schibbsy v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; compared with *Westlake* (4th ed.), pp. 373, 374, and R. S. C. 1883, Ord. XI. r. 1 (e).

<sup>3</sup> See *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358, 413, judgment of Fry, L. J.



England or in a foreign country, is held by our judges to give jurisdiction in respect of the wrong to the Courts of the country where the wrong is committed; but there is some, though not decisive, authority for the assertion that they do not recognise such a ground of jurisdiction.<sup>1</sup>

The Common Law Procedure Act, 1852, ss. 18, 19, indeed gave the Common Law Courts jurisdiction (which the judges themselves thought in principle hardly defensible)<sup>2</sup> over a defendant not present in England, when either the cause of action arose in England or depended upon the breach of a contract made in England,<sup>3</sup> and the High Court now claims jurisdiction *in personam* over an absent defendant when the action is founded on a breach in England of any contract, wherever made, which, according to the terms thereof, ought to be performed in England.<sup>4</sup> Whether the High Court would concede an analogous jurisdiction to foreign tribunals is a point on which no certain opinion can be pronounced, whilst authority can be<sup>5</sup> cited for the proposition that the mere circumstance of a contract having been made in a foreign country does not give jurisdiction to the Courts thereof. Assume, however, that the High Court holds that foreign Courts can exercise any jurisdiction which it claims for itself; even then the respect paid by our judges to the *forum obligationis* is reduced to this, namely, that the Courts of a country have, in the opinion of the High Court, jurisdiction over a defendant who has broken in that country a contract which, by the terms thereof, ought to be performed there.

Even this amount of respect for the *forum obligationis* cannot, it will be said, be explained by the principle of effectiveness. This is true; but the jurisdiction of the Courts of a country where a contract is intended to be performed, and is in fact broken, admits of explanation as an extension of the principle of submission. If X contracts with A to do something, *e.g.*, build a house or deliver goods in France, there is, at any rate, some ground for

<sup>1</sup> *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670. Compare chap. xiii., Rule 84, *post*.

<sup>2</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

<sup>3</sup> C. L. P. Act, 1852, s. 18. And see *Jackson v. Spittall* (1870), L. R. 5 C. P. 542; *Durham v. Spence* (1870), L. R. 6 Ex. 46; *Allhusen v. Malgarejo* (1868), L. R. 3 Q. B. 340.

<sup>4</sup> R. S. C. 1883, Ord. XI. r. 1 (e).

<sup>5</sup> *Rousillon v. Rousillon* (1880), 14 Ch. D. 351. Compare, especially, *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670; and see chap. xiii., Rule 84, *post*.

the assumption that *X* and *A* tacitly agree to submit any controversy as to the performance of the contract by *X* to the decision of the French Courts. If this explanation be thought far-fetched, then the deference, limited as it is, paid to the *forum obligationis* must be treated as an anomaly, suggested to English judges when framing rules as to jurisdiction<sup>1</sup> by the provisions of the Common Law Procedure Act, 1852, ss. 18, 19.

(3) *Jurisdiction founded on possession of property.*<sup>2</sup>—Ought the possession of immovable or movable property in a particular country to give the Courts thereof jurisdiction over the possessor? This is a question which, in the opinion of English judges, is still open to discussion.

Two points, however, must be carefully distinguished.

The possession of property, whether land or goods, undoubtedly gives the Courts of the country where the property is situate jurisdiction over that property, and, therefore, over the owner or possessor thereof, in regard thereto. If a man claims land or goods in Italy, the Italian Courts have a right to determine who is the person entitled to the ownership, or possession, of such land or goods. Such a determination is in substance, though not necessarily in form, a judgment *in rem*, and its effect is, subject to exceptions, with which we need not now trouble ourselves, fully recognised by English Courts.<sup>3</sup> One may perhaps go further and say that the possession of property, at any rate of land, in a country gives the Courts jurisdiction over the possessor in regard to obligations connected with this property.<sup>4</sup> This concession of jurisdiction is not only consistent with, but confirmatory of, both the principle of effectiveness and the principle of submission.

The possession of property, whether land or movables, is, however, in Scotland, as in some other countries, held to give the Courts of the country jurisdiction over the possessor, not only in respect of the property or of duties connected therewith, but generally, and in short, to have the same effect as is given to the presence of the owner in Scotland. This is apparently the theory of

<sup>1</sup> R. S. C. 1883, Ord. XI. r. 1.

<sup>2</sup> Compare chap. v, Rule 46, Exception 4, and chap. xiii., Rule 84, *post*.

<sup>3</sup> See *Castrique v. Imrie* (1870), 39 L. J. C. P. 350; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 163; *Atcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

<sup>4</sup> *Ibid.*, and *Beequet v. McCarthy* (1831), 2 B. & Ad. 951; and compare R. S. C. 1883, Ord. XI. r. 1 (a), (b).

(so-called) arrestment to found jurisdiction;<sup>1</sup> if, for example, *X* has broken a contract with *A*, or done a wrong to *A*, and goods of *X*'s are lying in Scotland, the arrest of the goods gives the Scotch Courts, according to Scotch law, jurisdiction to entertain an action against *X* for the breach of contract or the wrong.<sup>2</sup> The High Court, however, does not claim jurisdiction for itself on account of the presence in England of a defendant's property, and English judges have expressed the greatest doubt whether the possession of property locally situate in a country and protected by its laws does afford a ground of jurisdiction, and incline to the opinion that it does not.

Now the noticeable thing is the existence of this doubt and the reason thereof. The argument for basing jurisdiction on the possession of property is that the possession by *X* of property, *e.g.*, in Scotland, especially when seized by the Scotch Courts, does, as far as it goes, give the Courts the means of rendering a judgment against *X* effective. The argument against making the possession of property a ground of jurisdiction is that "the existence of "such property, which may be very small, affords no sufficient "ground for imposing on the foreign owner of that property a duty "or obligation to fulfil the judgment"<sup>3</sup> given against him by the foreign Court in an action, *e.g.*, for libel, which has no reference to his rights over such property. In other words, the objection to jurisdiction founded on the possession of property, say in Scotland, is that the fact of *X*'s possessing property in Scotland does not of itself give the Scotch Courts power to deliver an effective judgment against *X*. Whatever be the weight of the arguments in favour of, and against, the founding of jurisdiction on the possession of property, the hesitation of English judges in the matter is instructive. They hesitate because there is a difficulty in determining how far jurisdiction resting on the possession of property stands the test of effectiveness.

(4) *Jurisdiction founded on considerations of convenience.*—The High Court assumes jurisdiction in certain instances on the ground of convenience, and especially upon the ground of the advantage of pronouncing judgment once for all against every person interested in a particular action. Thus a person, *Y*, living out of England, may be joined as defendant in an action against *X*,

<sup>1</sup> Mackay, *Pract. Court of Session*, i. pp. 173—176.

<sup>2</sup> See especially, *Ibid.*, p. 177, note (a).

<sup>3</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 163.

because he is a proper party to the action,<sup>1</sup> and on similar grounds a defendant may join in the action a third party,<sup>2</sup> against whom he is entitled to indemnity even though such third party be out of England. The exercise of jurisdiction in these instances cannot fairly be brought under the principle either of effectiveness or of submission; it is, strictly speaking, anomalous and justifiable, if at all, only by considerations of immediate convenience. Our Courts would scarcely admit the validity of foreign judgments against persons made parties to an action under rules similar to Rules of Court, 1883, Ord. XI. r. 1 (g), or Ord. XVI. r. 48.

Our examination, then, of the principles, or criteria, of jurisdiction leads to this result. The greater number of the instances in which the High Court itself claims jurisdiction, or allows jurisdiction to foreign Courts, fall under one or other of our two principles. The instances which do not at first sight fall under one of these principles are some of them seen to be in reality applications of one or other of these principles, modified more or less by the desirability (*e.g.*, in the case of divorce) of enabling the Court of some one country to give a final decision on matters as to which the Court of no country can give an absolutely effective judgment. In other instances the rule as to jurisdiction is doubtful, but in these the doubt is found, on investigation, to arise not from the invalidity of our tests, but from a difference of opinion on the result to which the application of these tests leads. There are, further, one or two cases in which our Courts, for purposes of convenience, exercise a jurisdiction which they would not concede to foreign tribunals. If, however, the instances in which our tests obviously hold good be fairly compared with the few instances in which their validity is disputable, the conclusion to which we are led is that the principle of effectiveness and the principle of submission are the true, though not perhaps the sole, criteria of jurisdiction.

### *Choice of Law.*<sup>3</sup>

GENERAL PRINCIPLE No. V.—The nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired.<sup>4</sup>

<sup>1</sup> Compare chap. v., Rule 46, Exception 7, *post*, based on Ord. XI. r. 1 (g).

<sup>2</sup> See Ord. XVI. r. 48.

<sup>3</sup> See as to choice of law, chaps. xix. to xxxii., *post*.

<sup>4</sup> See *Hooper v. Gunn* (1867), L. R. 2 Ch. 282, 289, judgment of Turner, L. J.

This principle is an immediate inference from Principle No. I. If *A* acquires, under the law of France, a right to be paid 20% by *X*, it follows that, if *A* is to enforce his right, we must inquire exactly what the right is which the law of France gives him, for if this is not done, and the case is determined exactly as if the debt had been incurred in England, then it is possible that *X* may receive something more or less than he can fairly claim, or, in other words, that English Courts may enforce, not the right acquired under the law of France, but some different right. But to do this is to violate General Principle No. I. We may see more clearly that this is so, if we suppose the French Courts to be called upon to enforce a right acquired by *A* against *X* under the law of England. The reason why they enforce *A*'s claim at all is the advisability of giving effect in France to rights acquired by one Englishman against another in England. But, if English law be not regarded as to the nature of the right acquired, we can see in a moment that error and injustice would be the result. Thus, *X* and *A* are Englishmen, living in England. *X*, out of gratitude to *A*, but for no consideration whatever, promises *A* to pay him 100%. The promise gives *A* no legal right whatever, under English law, to the payment of the 100% by *X*. Both parties being in France, *A* sues *X* in a French Court for the 100% as a debt owing to him. If *A*'s claim be measured, as it ought to be, by English law, then *A* will recover nothing; having acquired no right to payment under English law, he possesses no right which he can enforce in France. If, on the other hand, the nature of *A*'s claim be not measured by English law, then he may very possibly recover 100%; with the result that he enforces not a right duly acquired under English law, but a non-existent right which the French Courts erroneously thought he had acquired under English law. The French Courts, in other words, through neglect of Principle No. V., fail in their effort to enforce in France a right acquired under the law of England.<sup>1</sup>

#### GENERAL PRINCIPLE No. VI.—Whenever the legal

Compare *Anderson v. Laneville* (1854), 9 Moore, P. C. 325, and *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Embiricos v. Anglo-Austrian Bank*, [1904] 2 K. B. 870; [1905] 1 K. B. (C. A.) 677.

<sup>1</sup> Compare, as to possible mistake as to the law of England, *Castrique v. Imrie* (1870), L. R. 4 H. L. 414. It seems to follow that where a promise, governed by the law, *e.g.*, of Scotland, is under Scotch law valid, without a consideration, an action may be maintained upon it in England.

effect of any transaction depends upon the intention of the party or parties thereto, as to the law by which it was governed, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties.<sup>1</sup>

This is a canon having reference, not to the *acquisition* but to the *interpretation* of rights; it defines a second ground on which English Courts have to consider the effect of foreign law. In the cases which come within it regard is paid to foreign law, not because such law confers any rights upon a given person, but because the terms of the law explain what are the rights which given persons intended to give or acquire in consequence of a particular transaction.

In many instances the legal effect of a person's conduct is independent of his will or intention. In others, and notably in the case of wills or contracts,<sup>2</sup> the aim of the Courts is to carry out the intention or wish of some given person or persons, and if the Courts are called upon to construe a testamentary document or agreement, they must look to the intention of the testator or of the contractors. But such intention cannot in most cases be ascertained without considering what was the law with reference to which the testator made his will, or the contractors entered into an agreement. The person whose intention has to be ascertained—we will suppose him, for the sake of simplicity, to be a testator—may point out in so many words what is the body of rules, or the law in reference to which his will is to be construed. An Englishman domiciled in England may say expressly that he wishes his property to be distributed, in so far as English law does not forbid such distribution, in accordance with the principles laid down by Bentham in his *Principles of a Civil Code*, chapter iii., or in accordance with the provisions of the *Code Napoléon*. In the one case it would be necessary to examine the writings of the jurist, in the other it would be necessary to examine the French Code, in order to determine what were the intentions of the testator. The

<sup>1</sup> As to contracts, see *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Greer v. Poole* (1880), 5 Q. B. D. 272; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321. As to marriage settlements, see *Este v. Smyth* (1854), 18 Beav. 112, 121, 122, judgment of Romilly, M. R. As to wills, see *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617, 625; *Studd v. Cook* (1883), 8 App. Cas. 577; Nelson, *Cases on Priv. Int. Law*, p. 193.

<sup>2</sup> See, especially, chap. xxv., Rules 146, 152, and Sub-Rules thereto, *post*.

rights of the persons benefited by the will would depend, in the one instance, on the doctrines of Bentham, and in the other on the provisions of the Code Napoléon. It is of course perfectly plain that neither Bentham's writings nor the Code would be the *source* of the rights acquired by the will; the source would be the law of England giving effect to the intention of the testator. Bentham's works, or French law, would be consulted only with a view to ascertaining what were the testator's intentions. Foreign law, to confine our attention to the Code Napoléon, would be not the source of a right, but simply a necessary means of interpreting a right. So if *A* and *X* enter into a contract to be carried out in France, and expressly provide that its terms shall be construed in accordance with French law. An English judge, called upon to decide whether the agreement has or has not been broken, must of necessity consider the nature of the French law of contract.<sup>1</sup>

These remarks apply equally to the far more frequent cases in which, though a document contains no explicit incorporation of foreign law, the inference may fairly be drawn, either from the terms used or from the nature of the transaction, that it was written or executed with reference to the law of some foreign country. Suppose, for example, that a Frenchman, domiciled in England, makes a will in which the terms of French law are employed, it becomes necessary to consider, in construing the will, whether we must not incorporate into it the law of France, and a similar question occurs wherever a contract is entered into which, though containing no reference to French law, is to be wholly or partially performed in France. "The general principle, in short, "by which the Court [is guided] in the solution of the question as "to what law ought to prevail [is] that the rights of the parties "to a contract are to be judged of by that law by which they "intended, or rather by which they may justly be presumed to "have intended, to bind themselves,"<sup>2</sup> and all the special rules of interpretation enjoining that a contract must be construed in some instances according to the law of the domicil of the parties, in others according to the law of the flag, in others according to the law of the place of performance, or in others according to the law of the place where the contract is made, are, in so far as they hold

<sup>1</sup> See, for an illustration of the incorporation of foreign law in a contract, *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q. B. (C. A.) 408.

<sup>2</sup> See *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 326, 327, per Chitty, J.; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122. See Foote, 3rd ed., p. 391.

good, simply applications to special circumstances of the principle that you must look to the intention of the parties. By "intention," however, we must always remember is meant, not the expressed, or even the consciously entertained, intention of the particular persons, but the intention which, in the opinion of the Court, most persons in the position of the particular parties would have entertained had their minds been called to the matter at the moment of entering into a contract or other legal transaction.

What for our present purpose deserves particular attention is, that reference to foreign law under Principles No. V. and No. VI. is due to different causes. Under Principle No. V. our Courts look to foreign law as the *source* of an alleged right; under Principle No. VI. they look to foreign law as an *interpretation* of an alleged right. If, for example, *A*, a French citizen, sells and delivers goods at Paris to *X*, another French citizen, and sues *X* for payment in England, *A*'s right to payment by *X*, if it exist, originates in, and depends upon, French law. It is in reality a "French right," if the expression may be used, which *A* attempts to enforce in England, and to such an attempt any provision of French law which extinguishes *A*'s right is an answer.<sup>1</sup> If, on the other hand, *A* and *X*, two Englishmen domiciled in England, make a contract, or *T*, an Englishman domiciled in England, executes a will, the terms whereof to a certain extent embody the law of France, the rights of the parties under the contract or of the beneficiaries under the will arise from the law of England, though they cannot be interpreted without reference to the law of France; just as, to recur to an example already used, the will of an Englishman domiciled in England, under which the testator's property is to be distributed in accordance with the views of Jeremy Bentham, needs for its interpretation a reference to Bentham's works, though it is clear that the rights of the beneficiaries under the will depend, not upon any authority possessed by Bentham, but upon the law of England.

The distinction between the two different grounds for the application of foreign law to the determination of a given case has been sometimes overlooked; nor is it always very easy to see on which of the two grounds it is that foreign law is really applicable.

<sup>1</sup> See *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525. Note that a mere extinction of *A*'s remedy, e.g., by a law of limitation, is not the same thing as the extinction of *A*'s right. See Comment on Rule 193, chap. xxxii., *post*.



The determination, however, of what may seem a fine point may be of considerable importance.<sup>1</sup>

It should, however, be observed that General Principle No. VI., no less than General Principle No. V., is nothing but an application of the fundamental canon of private international law embodied in General Principle No. I.; they are both of them maxims for ascertaining what is the legal right in fact acquired by a given person, *A*, which therefore our Courts may under Principle No. I. rightly enforce. If his right is acquired under the law of France, you must determine its existence and nature by French law, *i.e.*, you must apply General Principle No. V.; if his right again, though acquired under the law of England, is to be interpreted by reference to the law of France, you must explain and define it by reference to French law, *i.e.*, you must apply General Principle No. VI.

What, it may be asked, is the true nature and the real value of the General Principles propounded in this Introduction?

They are not axioms whence may at once be logically deduced the Rules to be found in the body of this treatise.

They are not again propositions covering the whole field of private international law and possessing such accuracy and precision as to be applicable with confidence to the solution of the novel questions, which from day to day arise as to the extra-territorial recognition of rights. With regard, indeed, to some departments of law (such, for example, as the law of contract) which have been fully worked out, and the fundamental conceptions whereof have been finally determined in England, by many years of judicial legislation, it may be possible to lay down leading propositions which cover the whole subject. With regard to the rules of private international law recognised by English Courts this is impossible. These rules are of recent growth. They are subject to constant change and expansion. Whilst many single maxims may be treated as well established, many of the fundamental ideas on which the system rests are far from being well defined or beyond dispute, and rules, it must be added, which are repeated in text-books, and even in judgments, will often be found on examination to rest on a very narrow basis of precedent; whilst the actual practice of the Courts in some instances hardly coincides with

<sup>1</sup> Compare *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321; *Hamlyn v. Talisker Distillery*, [1894] A. C. 204.

doctrines nominally laid down in judgments of received authority.

But though the foregoing General Principles are neither axioms, nor precisely stated propositions which cover the whole field of private international law, they possess a distinct character and value of their own.

They are essentially generalisations suggested by the decisions of the Courts taken in combination with judicial dicta, and with the doctrines in regard to the conflict of laws propounded by writers, such as Story, Westlake, or Savigny, of acknowledged weight and authority. These generalisations, though not laid down, in so many words, by English judges, do, it is submitted, express the grounds on which reported decisions may logically be made to rest; they are far less the premises from which our judges start, when called upon to determine any question of private international law, than the principles towards the establishment of which the decisions of our Courts gradually tend. They mark not so much the *terminus a quo* as the *terminus ad quem* of judicial legislation. The doctrine, for example, which is embodied in General Principle No. I., of the extra-territorial recognition of duly acquired rights, is rarely, if ever, enunciated in its full breadth by an English Court. But hardly a month passes without some judgment being delivered in some Division of the High Court which exhibits the increasing influence in England of the tendency, prevalent throughout the civilised world, to give full effect to rights acquired under,<sup>1</sup> or in some way measured by,<sup>2</sup> foreign law. The principle again, that the jurisdiction of a country's Courts is, or ought to be, governed by the criterion of effectiveness,<sup>3</sup> may be nowhere authoritatively laid down as a maxim recognised by the law of England. But our Courts do to a very great extent regulate the exercise of their own jurisdiction, and still more often determine what recognition is to be given to foreign judgments by reference to the test of effectiveness. Even the anomalous instances in which this criterion or principle is disregarded cannot be understood unless the principle itself is recognised; for the true bearing of an exception is never fully perceived without a knowledge of the rule from which it is a deviation.

When the nature of these General Principles is appreciated,

<sup>1</sup> General Principle No. V., p. 58, *ante*.

<sup>2</sup> General Principle No. VI., pp. 59, 60, *ante*.

<sup>3</sup> General Principle No. III., p. 40, *ante*.

their true value becomes apparent. They open to students a general view of the whole subject of private international law as administered by English Courts. They indicate the direction in which the rules as to the extra-territorial recognition of rights tend, and thus give a rational meaning to maxims which, when taken by themselves, appear arbitrary or conventional; and, if they do not directly solve new problems of private international law, help us in perceiving what are the problems which need solution. These General Principles, in short, in so far as they are correct generalisations obtained from and confirmed by decided cases, place a reader in the right position for appreciating the meaning and the effect of the body of rules which regulate the extra-territorial recognition of rights.

## BOOK I.

## PRELIMINARY MATTERS.

Book I. treats of matters which are in strictness preliminary to the Rules contained in Books II. and III.

Chapter I. contains the interpretation of certain terms, such for example as "country," "foreign country," and the like, which often occur in the subsequent Rules, and the accurate apprehension whereof facilitates the understanding of the whole Digest.

Chapter II. contains Rules for determining a given person's domicile.

Chapter III. contains Rules for determining a person's "nationality," in so far, at least, as it is necessary for the application of the Rules contained in Books II. and III. to decide whether he is, or is not, a British subject.

The principles, it is true, which regulate the acquisition, or loss, of domicile or of nationality are not in themselves rules for determining the extra-territorial effect of law, and may therefore seem to lie outside the scope of this treatise. But the application of many of our Rules, and notably of those relating to testamentary and intestate succession, frequently depends upon the ascertainment of a person's domicile, and occasionally upon determining whether he is a British subject or an alien. The reader therefore should have before him the principles which regulate the acquisition, loss, and resumption, both of domicile and of British nationality.

## CHAPTER I.

### INTERPRETATION OF TERMS.<sup>1</sup>

#### I. DEFINITIONS.

IN the following Rules and Exceptions, unless the context<sup>2</sup> or subject-matter otherwise requires, the following terms have the following meanings.

1. "This Digest" means the Rules and Exceptions contained in Books I. to III. of this treatise.

2. "Court" means His Majesty's High Court of Justice in England.<sup>3</sup>

3. "Person" includes a corporation or body corporate.<sup>4</sup>

4. "Country" means the whole of a territory subject under one sovereign to one system of law.<sup>5</sup>

5. "State" means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign<sup>6</sup>

6. "Foreign" means not English.<sup>7</sup>

<sup>1</sup> The terms defined are intended to bear in the Rules and Exceptions which make up the Digest the meaning here given them. It is not meant that they should necessarily have the same sense in the comment which accompanies the Digest. To restrict in the comment the use of every term used in the Digest to the special meaning there given it, would involve the employment of strained or unnatural language without conducing to the intelligibility or precision of the comment.

<sup>2</sup> The sense given to a term in this clause is occasionally varied in express words in some of the subsequent Rules. See, *e.g.*, definition of "Court," Rule 53, p. 277, *post*.

<sup>3</sup> And, if and so far as the Court of Appeal has original jurisdiction, includes the Court of Appeal.

<sup>4</sup> See p. 69, *post*.

<sup>5</sup> See p. 69, *post*.

<sup>6</sup> See p. 71, *post*.

<sup>7</sup> See p. 71, *post*.

7. "Foreign country" means any country which is not England.<sup>1</sup>

8. "England" includes any ship of the Royal Navy wherever situate.<sup>2</sup>

9. "United Kingdom" means the United Kingdom of England, Scotland, and Ireland,<sup>3</sup> and the islands adjacent thereto, but does not include either the Isle of Man or the Channel Islands.

10. "British dominions" means all countries subject to the Crown, including the United Kingdom.

11. "Domicil" means the country which in accordance with the Rules<sup>4</sup> in this Digest is considered by law to be a person's permanent home.<sup>5</sup>

12. "Independent person"<sup>6</sup> means a person who as regards his domicil is not legally dependent, or liable to be legally dependent, upon the will of another person.

13. "Dependent person" means any person who is not an independent person as hereinbefore defined, and includes:

(i) a minor.

(ii) a married woman.

14. "An immovable" means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real.<sup>7</sup>

15. "A movable" means a thing which is not an immovable, and includes:

(i) a thing which can be touched and can be moved, and

(ii) a thing which is the object of a claim,<sup>8</sup> and cannot be touched, or, in other words, a *chose in action*.

<sup>1</sup> See p. 71, *post*.

<sup>2</sup> See p. 71, *post*.

<sup>3</sup> More formally, the United Kingdom of Great Britain and Ireland.

<sup>4</sup> See Rules 1 to 18, and, as to domicil of corporations, Rule 19, *post*.

<sup>5</sup> Compare p. 83, *post*.

<sup>6</sup> See p. 73, *post*.

<sup>7</sup> See p. 74, *post*.

<sup>8</sup> See p. 75, *post*.

16. "*Lex domicilii*," or "law of the domicile," means the law of the country where a person is domiciled.<sup>1</sup>

17. "*Lex loci contractus*" means the law of the country where a contract is made.<sup>2</sup>

18. "*Lex loci solutionis*" means the law of the country where a contract is to be performed.<sup>3</sup>

19. "*Lex situs*" means the law of the country where a thing is situate.<sup>4</sup>

20. "*Lex fori*" means the local or territorial law of the country to which a Court, wherein an action is brought, or other legal proceeding is taken, belongs.<sup>5</sup>

#### Comment.

(3) *Person*.<sup>6</sup>—The word "person," both in law and even as used in common conversation, includes not only a natural person or human being, but also an artificial person or, speaking broadly, a corporation. This wide sense is the meaning given to the word in this Digest.

It must, however, be remembered that every definition is to be taken subject to the reservation "unless the context or subject-matter otherwise requires." There are many Rules which can obviously apply only to natural persons.<sup>7</sup>

(4) *Country*.—The word "country" has among its numerous significations the two following meanings,<sup>8</sup> which require to be carefully distinguished from one another.

<sup>1</sup> See p. 77, *post*.

<sup>2</sup> See p. 77, *post*.

<sup>3</sup> See p. 78, *post*.

<sup>4</sup> See p. 78, *post*.

<sup>5</sup> See p. 78, *post*.

<sup>6</sup> Only those terms are commented upon which need some explanation.

<sup>7</sup> *E.g.*, Rule 8, *post*.

<sup>8</sup> It means, for example (in its geographical sense), "a geographical district making up a separate part of the physical world," as in the expression, a newly discovered country. It means again (in what may be termed its historical sense) a land inhabited, or supposed to be inhabited, by one race or people, as, for instance, Italy, before the Italians were united under one Government. Neither the geographical nor the historical sense of the word directly concern writers on law, but the geographical sense is worth notice, as putting in ordinary language a limit to the use of the word in its political and legal senses. There is an awkwardness, though one which cannot be avoided, in calling the whole British Empire one "country" in the political sense of the term. The awkwardness is due to

(i) A country, in what may be called the political sense of the word, means "the whole of the district or territory, subject to one sovereign power,"<sup>1</sup> such as France, Italy, the United States, or the British Empire.

A country in this sense is sometimes called a "realm," with reference to the sovereign and his authority over the territory and over his subjects therein. It is sometimes termed a "state," in one of the many meanings of that word, when considered in reference to the citizens and their allegiance to the sovereign who has authority over the territory.

The word "country" is not, in this Digest, used in its political sense of a realm or state.

(ii) A country, in what may be called the legal sense of the word, means "a district or territory, which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one system of law;" such, for example, as England, Scotland, or Ireland, or as each of the States which collectively make up the United States.

For the term "country," in the legal sense of the word, there is no satisfactory English substitute. If the use of a new term be allowable, a country might, in this sense (on the analogy of the Latin *territorium legis* and the German *Rechtsgebiet*), be called a "law district," and this expression is occasionally used in this treatise.

The term "country" is, with one possible exception,<sup>2</sup> throughout this Digest, and generally (though not invariably) in the body of the work, used in its legal sense of law district.

It is worth while to dwell a little further upon the relation between the meaning of the word country in its political sense of realm and its legal sense of law district.

Territories ruled by different sovereigns never constitute one country in either sense of the term, but a territory ruled by one and the same sovereign, *i.e.*, a realm, though it may as a fact constitute one country or law district, may also comprise several such countries or law districts.

the excessive deviation in this application of the word from its more ordinary geographical sense.

<sup>1</sup> The term sovereign or sovereign power is, it need hardly be observed, not used here in the sense of a king or monarch, but in the sense in which it is employed by jurists, of the power, whatever its form, which is supreme in an independent political society. See Austin, *Jurisprudence*, 4th ed., i. p. 249.

<sup>2</sup> See Rule 35, *post*, where the language of the Naturalization Act, 1870, is followed.



Thus France, Italy, and Belgium, each constitute one separate country in both senses of the term. France (including, of course, in that term French dependencies) is one country in the political sense of the word, and is also one country or law district in the legal sense of the term. On the other hand, the British Empire, while constituting one country, realm, or state in the political sense of the term country, consists of a large number of countries in the legal sense of the word, since England, Scotland, Ireland, the Isle of Man, the different colonies, &c., are in this sense separate countries or law districts.

(5) *State*.—The word “state” has various senses. It is often used as meaning a political society, governed by one and the same sovereign power. Here it is used in contrast with country as the whole of the territory, subject to one sovereign power. The limits of a state obviously may, or may not, coincide with the limits of a country.

(6) *Foreign*, and (7) *Foreign Country*.—The word “foreign” means, as used throughout this Digest, simply “not English.” Thus, a Scotch parent is as much within the term foreign parent as an Italian or a French parent. The expression “foreign country” means any country except England, and applies as much to Scotland, Ireland, New Zealand, &c., as to France or Italy.<sup>1</sup>

(8) *England*.—The word “England” is used in its ordinary sense of England and Wales, including any adjacent islands, such as the Isle of Wight or Anglesea, which form part of, or are, English or Welsh counties. The word, however, is by our

<sup>1</sup> See, however, *In re Orr-Ewing* (1882), 22 Ch. D. (C. A.) 456, 464, 465, for an objection by Jessel, M. R., to the use of the word “foreign,” as applied to Scotland. His objection, in effect, is that Scotland is not a foreign country, but “ever since the union of the kingdom of Great Britain . . . has been an integral part of Great Britain.” The reply to this objection is, first, that Scotland, though of course not a “foreign” country in the sense in which the word “foreign” is popularly and rightly used in ordinary discourse, certainly is a “foreign” country in the sense in which these words are defined in this treatise, and, secondly, that such a definition is both justifiable and convenient in a book treating of the conflict of laws. The justification is to be found in the fact that English Courts do, in regard to questions having reference to the conflict of laws, in most, though not quite in all respects, treat Scotland and Ireland as “foreign countries,” or, in other words, the rules of private international law are applied by the High Court in England in pretty much the same manner to all other countries, whether they are or are not subject to the British Crown. This fact is made prominent, as it ought to be, by applying to all countries, except England, the epithet “foreign.”

definition extended so as to include a ship of the Royal Navy wherever situate, *e.g.*, when lying in an Italian port;<sup>1</sup> such a ship is, it is said,<sup>2</sup> regarded by a fiction of law as part of the parish of Stepney. In any case, a person on board thereof is within the territorial jurisdiction of the High Court, *i.e.*, is considered as being in England, and R. S. C. 1883, Order XI. r. 1, as to service of a writ out of the jurisdiction,<sup>3</sup> is inapplicable to him.<sup>4</sup> A British merchant ship, when on the high seas, is part of British territory, but under what circumstances, and to what extent, she is to be considered as part of England is open to some question.<sup>5</sup>

(11) *Domicil*.—A person's domicil is the place or country which is considered by law to be his permanent home.<sup>6</sup>

This merely verbal definition of the term “domicil” applies to all cases in which the word is used. Whenever a person of any description is said to be domiciled, or to have his domicil, in a particular country, *e.g.*, France, the least which is meant is that he is considered by the Courts to have his permanent home in France, and will be treated by them as being settled in France, or, in other words, that France is considered by the Courts to be his permanent home.

The words “considered by law” are important, and point to the fact that a person's domicil need not necessarily be his actual home; or, to put the same thing in another form, that the existence of a domicil is not a mere question of fact, but an inference of law drawn from the facts, whatever they may be, from which the Courts infer that a person has a domicil in a particular country.

This very general definition applies further to the domicil of both the classes of persons known to the law (that is to say):

- (1) Natural persons (or human beings).
- (2) Legal persons (or corporations).

Any more specific, and therefore narrower, definition of the term would not cover the domicil both of human beings and of corporations. For further information as to the nature and meaning of domicil, the reader is referred to the Rules explaining its meaning

<sup>1</sup> *Seagrove v. Parks*, [1891] 1 Q. B. 551.

<sup>2</sup> See Annual Practice, 1907, p. 63.

<sup>3</sup> Compare Rule 46, and Exceptions thereto, *post*.

<sup>4</sup> *Seagrove v. Parks*, [1891] 1 Q. B. 551.

<sup>5</sup> The answer to this question may conceivably affect the validity of a marriage on board a British merchant ship. See p. 620, note 4, *post*.

<sup>6</sup> See Rules 1 to 19, *post*.

or nature, with reference, first, to natural persons;<sup>1</sup> secondly, to corporations.<sup>2</sup>

(12) *Independent Person*, and (13) *Dependent Person*.—An independent person means a person who, as regards the legal effect of his acts, is not dependent on the will of any other person, or, in other words, whose will is for legal purposes exercised by himself, and by himself alone. Since the term is used in this Digest with reference to a person's legal capacity for acquiring or changing his domicile by his own acts, it means, as here used, a person legally capable of effecting a change of domicile, and who is not liable to have it changed by the act of any other person.<sup>3</sup>

The position of an independent person has two characteristics, the one positive, the other negative. The positive characteristic is the full legal capacity to act for himself, especially in the change of domicile. The negative characteristic is freedom from liability to be legally acted for, and especially to have his domicile changed at the will of another person.

Under English law a man of full age, or an unmarried woman of full age, is such an independent person.

A dependent person means a person who, as regards the legal effects of his acts, is dependent, or liable to be dependent, on the will of another person, or, in other words, whose will, as regards its legal effects, cannot be exercised by himself, and may be exercised by another person. Since the term is used in this Digest with reference to a person's legal capacity for acquiring or changing his domicile by his own acts, it means, as here used, a person who is not legally capable of effecting a change of domicile for himself, but whose domicile is liable to be changed (if at all) by the act of another.<sup>4</sup>

The position of a dependent person has therefore two characteristics, the one negative, the other positive. The negative

<sup>1</sup> See Rules 1 to 18, *post*.

<sup>2</sup> See Rule 19, *post*.

<sup>3</sup> Such a person as is here described by the term independent person is often called, both by judges and text-writers, a person *sui juris*. This expression is borrowed from Roman law. It is a convenient one, but is purposely avoided on account of the difficulty of transferring without some inaccuracy the technical terms of one legal system to another. A reader, however, should bear in mind that, in reference to domicile, a person *sui juris* means, when the term is used, what is here called an independent person.

<sup>4</sup> Such a dependent person is often termed by judges and text-writers a person not *sui juris*; the term, though convenient, is avoided in these rules for the same reason for which the corresponding term person *sui juris* is not employed.

characteristic is legal incapacity to act for himself, especially in the change of domicile. The positive characteristic is liability to be legally acted for, and especially to have his domicile changed for him by the act of another person.

Under different legal systems, different classes of persons are dependent persons. Under English law the two classes which indubitably fall within the term as already explained are—first, minors; and, secondly, married women.<sup>1</sup>

Neither of these classes has the legal capacity to make a change of domicile, and both of these classes are liable to have it changed by the act of another person, who in the case of minors<sup>2</sup> is generally the father, and in the case of married women<sup>3</sup> is always the husband.

The term “liable” in the definition should be noticed. It covers the case of a person (such as an infant without living parents or guardians) of whom it cannot be said that there is at the moment any person on whom he is dependent, or who can change his domicile. The infant is, however, even then not an independent person in the sense in which the word is here used. He is legally incapable of changing his own domicile,<sup>4</sup> and liable to have it changed (if at all) by the act of a person appointed guardian.<sup>5</sup>

(14) *An Immovable*, and (15) *A Movable*.

(i) The subjects of property are in general<sup>6</sup> throughout this treatise divided into immovables and movables, and under the latter head are included all things which do not fall within the description of immovables.

Immovables are tangible things which cannot be moved, such as are lands and houses, whatever be the interest or estate which a person has in them. Hence the term includes what English lawyers call “chattels real,” that is to say, land, &c., in which a person has less than a freehold interest, as, for instance, leaseholds.

<sup>1</sup> Lunatics are purposely not added. Their position in respect of capacity to effect a change of domicile is not free from doubt, but the better view seems to be that a lunatic's domicile cannot be changed by his committee. See comment on Rule 18, *post*.

<sup>2</sup> Rule 9, Sub-Rule 1, *post*.

<sup>3</sup> Rule 9, Sub-Rule 2, *post*.

<sup>4</sup> Rule 10 and Sub-Rule, *post*.

<sup>5</sup> *Pottinger v. Wightman* (1817), 3 Mer. 67; *In re Beaumont*, [1893] 3 Ch. 490.

<sup>6</sup> In some Rules, as, for example, those referring to administration, and in Rules which are intended to follow verbatim the words of an Act of Parliament, it is sometimes necessary to use to a limited extent the ordinary English division into realty and personalty, or real property and personal property.

Movables are, in the first place, such tangible things as can be moved, *e.g.*, animals, money, stock in trade, and in general terms goods; and, in the second place, “things” (using that word in a very wide sense indeed) which are the objects of a claim (*e.g.*, payment of money due from *X* to *A*), called by English lawyers “*choses in action*,” in one of the senses<sup>1</sup> of that ambiguous term.

It is convenient to group under the one head of movables goods and *choses in action* (the objects of a legal claim), for neither class falls under the head of immovables, and each class is in many respects, as regards the conflict of laws, subject to the same rules. There is, however, this essential distinction between goods and *choses in action*, that goods have in fact a local situation, and *choses in action* (*e.g.*, debts) have not. Hence, those Rules as to movables which depend upon an article having a real local situation, *i.e.*, occupying a definite space, do not, except by analogy, apply to *choses in action*.<sup>2</sup>

(ii) The division of the subjects of property into immovables and movables does not square with the distinction known to English lawyers between *things real*, or real property,<sup>3</sup> and *things personal*, or personal property.<sup>4</sup>

For though all things real are, with certain exceptions, included under immovables, yet some immovables are not included under things real; since “chattels real,”<sup>5</sup> or, speaking generally, leaseholds, are included under immovables, whilst they do not, for most purposes, come within the class of realty, or things real.

On the other hand, while all movables are, with certain exceptions, included under things personal, or personalty, there are things personal, *viz.*, chattels real, or, speaking generally, leaseholds, which are immovables, and are in no way affected by the Rules hereinafter laid down as to movables.

To put the same thing in other words, “immovables” are equivalent to realty, with the addition of chattels real or lease-

<sup>1</sup> *Chose in action* is used for—

- (i) the claim or right to a performance or service legally due from one man to another;
- (ii) the thing claimed, *e.g.*, the debt due;
- (iii) the evidence of the claim, *e.g.*, the bond on which a debt is due.

<sup>2</sup> See Rule 144, p. 522, *post*.

<sup>3</sup> See 1 Steph. Comm., 14th ed., pp. 92, 93.

<sup>4</sup> See 2 Steph. Comm., 14th ed., pp. 1—8.

<sup>5</sup> Chattels real include estates for years, at will, and by sufferance. See 1 Steph. Comm., 14th ed., p. 160.

holds; "movables" are equivalent to personalty, with the omission of chattels real.

(iii) Law is always concerned, in truth, not with things but with rights,<sup>1</sup> and therefore not directly with immovables or movables, but with rights over, or in reference to, immovables or movables, or, to use popular language, with immovable property and movable property. It will serve to make clear the relation between the division into immovables and movables, and the division into realty and personalty, if we treat each as a division, not of the subject of property, but of the rights of which property from a legal point of view consists.

Immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests.

Movable property includes both rights over movable things or goods, and rights which are not rights over a definite thing, but are claims by one person against another (*e.g.*, the claim by *A* to be paid a debt due to him by *X*, or generally to the performance of a contract made with him by *X*), or in other words, which are *choses in action*.

Realty, looked at as a division of rights, includes all rights over things which cannot be moved, except chattels real.

Personalty, looked at as a division of rights, includes both rights over movables and *choses in action*, and further includes chattels real, or leaseholds.

Hence, immovable property is equivalent to realty, with the addition of chattels real; movable property is equivalent to personalty, with the omission of chattels real.

It is of consequence to notice the difference between movables and personal property, because judges, especially in the earlier cases on the conflict of laws, have occasionally used language which identifies movables with personal property,<sup>2</sup> and suggests the conclusion that all kinds of personalty, including leaseholds,

<sup>1</sup> See as to this point, and for an account of the different meanings of the word "property," Williams, *Real Property*, 20th ed., pp. 3—6. What is particularly to be noted is that "property" in English law, as in ordinary language, means either (1) ownership in things, or (2) the things in which, or with regard to which, ownership may exist, or, to put the same thing more generally, property means either (i) rights legally capable of being exchanged for money, or (ii) the things (if any) which are the objects of such rights.

<sup>2</sup> See, *e.g.*, *Sill v. Worswick* (1791), 1 H. Bl. 665, 690, judgment of Lord Loughborough; *Birtwhistle v. Vardill* (1826), 5 B. & C. 438, 451, 452, judgment of Abbott, C. J.; *Forbes v. Stearn* (1870), L. R. 10 Eq. 178. Story habitually uses the terms personal property, personal estate, and the like, as meaning movables.

are, as regards the conflict of laws (*e.g.*, in the case of intestate succession), governed by the rules which apply to movables properly so called. This doctrine has now been pronounced erroneous, and leaseholds (it has been decided) are, as regards the conflict of laws, to be considered of course as personalty, but also as immovables.<sup>1</sup>

(16) *Lex domicilii*.—What is the country in which a person is domiciled must be determined in accordance with the Rules hereinafter stated.<sup>2</sup> It may even here be remarked that domicile is a totally different thing from residence.

A French citizen is permanently settled in England, but is residing for a time at Paris. The law of his domicile is the law of England.

(17) *Lex loci contractus*.—The expression *lex loci contractus*, at any rate as used by English Courts, is ambiguous.

(1) It means the law of the country or place where a contract is made or entered into. This is the sense in which it is always employed in this Digest, and is also the sense in which it is generally employed in the earlier English cases on the conflict of laws.

(2) It often means the law by which the parties who make a contract intend it to be governed,—the law, in short, to which the contract is made subject, in accordance with the intention of the parties, or, as it is often called, the proper law of the contract.<sup>3</sup>

These two laws constantly do in fact coincide, that is, are one and the same law, as where X in London sells goods to A, to be delivered and paid for in London. But they need not coincide. A marriage contract, or settlement, is made in England between X and A, who are a Scotch man and woman domiciled in Scotland. It appears, either from the express terms or indirectly from the language of the instrument, that the contract is intended to be carried out in accordance with the law of Scotland. In such a case the *lex loci contractus*, in the first sense of that term (the sense in which the term is used in this Digest), is clearly the

<sup>1</sup> *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Irish Rep. 9 Eq. 541; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123. Compare *Duncan v. Lawson* (1889), 41 Ch. D. 394; *Pepin v. Bruyère*, [1902] 1 Ch. (C. A.) 24. Conf. Westlake, pp. 207—209.

<sup>2</sup> See Rules 1—19, *post*.

<sup>3</sup> See Rule 146, p. 529, *post*.

law of England; the *lex loci contractus*, in the second sense of that term, is as clearly the law of Scotland.<sup>1</sup>

(18) *Lex loci solutionis*.—*X* contracts in London to deliver goods to *A* in Italy. The *lex loci solutionis* is the law of Italy.

(19) *Lex situs*.—*X* leaves by will to *A* lands in England, money in France, and furniture in Italy.

The *lex situs*, as regards the land, is the law of England; as regards the money, the law of France; as regards the furniture, the law of Italy.<sup>2</sup>

(20) *Lex fori*.—This expression, it should be noted, always means the *local or territorial* law of the country to which a Court wherein the action is brought, or other legal proceedings are taken, belongs.

Hence the term excludes the application of any law other than the local law; and this is so whether the country referred to be England or a foreign country. If, for instance, the assertion be made in reference to England that the Courts, as to certain matters (*e.g.*, procedure), always follow the *lex fori*, or, in other words, the law of England, what is meant is that, when an action, &c. is brought in an English Court, every matter of procedure is determined in accordance with the ordinary local or territorial law of England, and that this is so, even though the case have in it a foreign element, as where an Italian brings in England an action against a Frenchman for the breach of a contract made in Germany. So again, if a similar assertion be made with reference to Italy, what is meant is that, when an action is brought in an Italian Court, every matter of procedure is determined according to the ordinary local or territorial law of Italy, and that this is so, even though the case have in it a foreign element, as where an Englishman brings in Italy an action against a Frenchman for the breach of a contract made in New York.

<sup>1</sup> See App., Note 5, "Preference of English Courts for *lex loci contractus*." The *lex loci contractus*, in the sense in which it is used in this Digest, is merely one species of the *lex actus*, or the law of a place where a legal transaction takes place.

<sup>2</sup> It may be well, though it is hardly necessary, to point out that the object of these examples is to illustrate the meaning of the *lex situs*; they are not intended to show what is the law applicable to the things in question. As a matter of fact, succession to these things would be determined by an English Court, as regards the land, in accordance with the *lex situs*, but as regards the money and furniture, in accordance with the *lex domicilii*, of the testator.



## II. APPLICATION OF TERM "LAW OF COUNTRY."

In this Digest the law of a given country<sup>1</sup> (*e.g.*, the law of the country where a person is domiciled)

- (i) means, when applied to England, the local or territorial<sup>2</sup> law of England;
- (ii) means, when applied to any foreign country, any law, whether it be the local or territorial law of that country or not, which the Courts of that country apply to the decision of the case to which the Rule refers.<sup>3</sup>

### Comment.

*Law of country.*—The term law of a country, *e.g.*, the law of England or the law of Italy, is, as already explained,<sup>4</sup> ambiguous.<sup>5</sup> It means in its narrower and most usual sense the territorial or local law of any country, *i.e.*, the law which is applied by the Courts thereof to the decision of cases which have in them no foreign element.<sup>6</sup> It means in its wider sense all the principles or maxims, including, it may be, foreign law, which the Courts of a country apply to the decision of cases coming before them.

The Rules contained in this Digest state the principles according to which English Courts will determine what is the particular country, the law whereof is to be applied to the decision of a given case having in it any foreign element; these Rules, whether they lead to the application of English or of foreign law, are all Rules for the decision of cases coming before an English Court.

When these considerations are borne in mind, the varying meaning of the expression law of a country becomes intelligible.

<sup>1</sup> See as to the ambiguity of the term "law of a country," Intro., pp. 6, 7, *ante*.

<sup>2</sup> See as to the meaning of local or territorial law, Intro., p. 6, *ante*.

<sup>3</sup> This clause must of course be read subject to the definition of *lex fori*, under which such law always means local or territorial law.

<sup>4</sup> See Intro., p. 6, *ante*.

<sup>5</sup> So also are of course its equivalents, such as English law or Italian law, and terms of which it forms a part, such as *lex domicilii*, or "law of the country where a man is domiciled," or *lex situs*, or "law of the country where a thing is situate." *In re Johnson*, [1903] 1 Ch. 821, is not, I think, in reality inconsistent with this, but it is doubtful whether the case is rightly decided. See App., Note 1, "Law of a Country and the *Renvoi*."

<sup>6</sup> See Intro., p. 1, *ante*.

(1) *When country England.*—When any Rule, applied to the circumstances of a given case, designates England as the country the law whereof is to determine the case, or, in other words, directs that the case be determined in accordance with the law of England, then the term “law of England” must mean the local or territorial law of England. If the term were used in a more general sense and meant the law or principle, whatever it might be, which an English Court would apply to the case, the Rule would constitute an unmeaning truism; for we are dealing with cases decided by an English Court, and it is clear from the nature of things that any case so decided must be determined in accordance with some law or principle which the English Court applies to it.<sup>1</sup>

Thus, Rule 183<sup>2</sup> states (*inter alia*) that “the succession to the movables of an intestate is governed by the law of his domicil,” *i.e.*, by the “law of the country” where he is domiciled, at the time of his death.

*D*, an intestate, dies domiciled in England. He is a French citizen resident in Italy. He leaves movables in England. Our Rule applied to the case designates England as the country in accordance with the law whereof his movables must be distributed, or in other words directs that his movables be distributed according to the local or territorial law of England, *i.e.*, in accordance with the Statute of Distribution. If by the law of England were, under these circumstances, meant some principle,<sup>3</sup> whatever it might happen to be, which the English Courts would apply to the case, the Rule would afford no guidance whatever.

(2) *When country is a foreign country.*—When any Rule applied to the circumstances of a given case designates a foreign country, *e.g.*, Italy, as the country the law whereof is to determine the case, or in other words directs that the case be determined in accordance with the law of Italy, then the term “law of Italy” means, unless the contrary is expressly stated, any principle or body of law which the Italian Courts hold applicable to the particular case. The Rule in effect directs that English Courts shall decide the case with reference to the law, whatever it be, according to which the Italian Courts would decide it.

Thus *D*, an intestate, dies domiciled in Italy. He is a French citizen resident in Italy. He leaves movables in England. Again apply Rule 183. The Rule applied to this case designates Italy

<sup>1</sup> See Intro., pp. 2—4, *ante*.

<sup>2</sup> See chap. xxxi., *post*.

<sup>3</sup> See Intro., pp. 3, 4, *ante*.

as the country in accordance with the law whereof *D*'s movables must be distributed; it directs, that is to say, that his movables be distributed according to the law of Italy. But the expression "law of Italy" here means not necessarily the territorial law of Italy, but any law which the Italian Courts would apply to the decision of the particular case. This might be the territorial law of Italy, but it might be, as in fact it probably is,<sup>1</sup> the territorial law of France. However this be, the Rule is here not unmeaning. It states that English Courts will determine a case which obviously contains foreign elements, in accordance with the law, whatever it may be, which the Italian Courts hold applicable to the case.<sup>2</sup>

<sup>1</sup> See Codice Civile del Regno d' Italia, Art. 7.

<sup>2</sup> "When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law [*i.e.*, what has been called in this treatise the local or territorial law], but, in some instances, of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and which would not be applied to a natural-born subject of that country. Thus in *Collier v. Rivaz* (2 Curt. 855), the testator, an English-born subject, died domiciled in Belgium, leaving a will not executed according to the forms required by the Belgian law: By that law, the succession in such a case is not to be governed by the law of the country applicable to its natural-born subjects, but by the law of the testator's own country: And it was held [in England] that the will, being valid according to the law of England, ought to be admitted to probate." 1 Williams, Exors., 10th ed., pp. 276, 277; see also *Pechell v. Hildersley* (1869), L. R. 1 P. & D. 673; *In Goods of Laeroix* (1877), 2 P. D. 94. "The idea," it has been pointed out, "that the law of a particular country does not mean the ordinary law of the land, but the law which would be applied by [the Courts of] that country to a given case,—a view which is sufficiently familiar to English students of private international law, is by no means so well known in France." See "The Bourgoise Case in London and Paris," by Malcolm Mell-wraith, 6 L. Q. Rev. 379, 387 (n.).

Two observations are worth making:—

1. The ambiguity in the expression "law of a country" would, for the purpose of this Digest, and indeed of private international law generally, cease to exist were all nations agreed on the principles governing the choice of law. Were this so, which is of course far from being the case, the term "law of a country" would always mean the territorial law of such country. Thus, if the Italian Courts agreed with the Courts of England in referring succession to movables wholly to the *lex domicilii*, the rule that succession to movables is governed by the law of the country where an intestate dies domiciled would mean that if he died domiciled in England, succession to his movables was governed by the territorial law of England, and that if he died domiciled in Italy, it was governed by the territorial law of Italy.

2. The illustrations given in the text of the meaning of the term "law of a country," when applied to England and to a foreign country respectively, refer to the *lex domicilii*, but the principle which they illustrate applies with one exception to every other class of law, *e.g.*, to the *lex situs*, or "law of a country where a thing is situate." The one exception is the *lex fori*. This by its very definition always means the local or territorial law of the country to which a Court wherein legal proceedings are taken belongs. See pp. 69, 78, *ante*.

## CHAPTER II.

DOMICIL.<sup>1</sup>(A) DOMICIL OF NATURAL PERSONS.<sup>2</sup>

## I. NATURE OF DOMICIL.

RULE 1.—The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.<sup>3</sup>

## Comment and Illustrations.

No definition<sup>4</sup> of domicile has given entire satisfaction to English judges. As, however, a person's domicile may certainly be described as the place or country which is considered by law to be his home, and as a place or country is usually (though not invariably)

<sup>1</sup> Story (7th ed.), chap. iii. ss. 39—49 *c*; Westlake, chap. xiv. (4th ed.), pp. 309—347; Foote, chap. ii. (3rd ed.), pp. 52—68; Savigny, ss. 350—355, Guthrie's transl. (2nd ed.), pp. 86—114.

<sup>2</sup> For domicile of natural persons, *i.e.*, human beings, see Rules 1—18. For domicile of legal persons or corporations, see Rule 19, *post*.

<sup>3</sup> "Domicil meant permanent home, and if that was not understood by itself, "no illustration could help to make it intelligible." *Whicker v. Hume* (1858), 28 L. J. Ch. 396, 400, per Lord Cranworth; *Attorney-General v. Rowe* (1862), 31 L. J. Ex. 314, 320. See further, as to the meaning of "home," pp. 83—87, *post*.

<sup>4</sup> See App., Note 6, "Definition of Domicil." For the purposes of private international law, the "place" within which it is required to determine a man's domicile is always, or almost always, a "country," in the sense in which the word has been hereinbefore defined. The words "place or" might, therefore, in strictness, be omitted from this rule. It is, however, convenient to give a general description of domicile applicable to any place, whether it be a state, a country, a town, &c., within the limits whereof it may be desired to determine a person's domicile. See further, pp. 93—96, *post*.

“considered by law” (*i.e.*, by the Court) to be a person’s home, because it is so in fact, light is thrown on the nature of domicile by a comparison between the meanings of the two closely connected terms, home and domicile.

*Home*.—The word “home” is not a term of art, but a word of ordinary discourse, and is usually employed without technical precision. Yet, whenever a place or country is termed, with any approach to accuracy, a person’s home, reference is intended to be made to a connection or relation between two facts. Of these facts the one is a physical fact, the other a mental fact.

The physical fact is the person’s “habitual physical presence,” or, to use a shorter and more ordinary term, “residence,”<sup>1</sup> within the limits of a particular place or country. The mental fact is the person’s “present intention to reside permanently, or for an “indefinite period,” within the limits of such place or country; or, more accurately, the absence of any present intention<sup>2</sup> on his part to remove his dwelling permanently, or for an indefinite period, from such place or country. This mental fact is technically

<sup>1</sup> The term “residence” is used by some writers as synonymous with the word “home,” *i.e.*, as including both “residence,” in the sense in which the word is used in the text, and the “intention to reside” (*animus manendi*). To this use of the word “residence” there is in itself no objection, but there is great convenience in appropriating (as is done throughout this treatise) the substantive “residence” and the verb “reside” to the description of the physical fact which is included in, but does not make up the whole of, the meaning of the word “home.” “Residence” has, in many instances, been employed by judges and others to denote a person’s habitual physical presence in a place or country which may or may not be his home. See, *e.g.*, *Jopp v. Wood* (1865), 34 L. J. Ch. 212, 218; *Gillis v. Gillis* (1874), Irish Rep. 8 Eq. 597. It is hoped, therefore, that the restriction of the term “residence” to this sense alone does not involve too wide a deviation from the ordinary use of language.

Though it is of little importance in which sense the words “residence” and “reside” are employed, it is of considerable importance that they should be used in one determinate sense. Confusion has sometimes arisen from the employment of the word “residence” at one time as excluding, and at another time as including, the *animus manendi*. Compare *Jopp v. Wood* (1865), 34 L. J. Ch. 212; 4 De G. J. & S. 616, with *King v. Foxwell* (1876), 3 Ch. D. 518.

The word “habitual,” in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period, whatever that period may be (whether ten years or ten days), referred to in each particular case.

<sup>2</sup> See Story, s. 43, for the remark that the absence of all intention to cease residing in a place is sufficient to constitute the *animus manendi*. The difficulty of determining where it is that a person has his home, or domicile, arises in general from the difficulty, not only of defining, but of ascertaining, the existence of the very indefinite intention which constitutes the *animus manendi*. See *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284, 292, language of Bramwell, B.

termed, though not always with strict accuracy, the *animus manendi*,<sup>1</sup> or "intention of residence."

When it is perceived that the existence of a person's home in a given place or country depends on a relation between the fact of residence and the *animus manendi*, further investigation shows that the word home, as applied to a particular place, or country, may be defined or described in the following terms, or in words to the same effect.

*Definition of home.*—A person's home is that place or country, either (i) in which he, in fact, resides with the intention of residence (*animus manendi*),<sup>2</sup> or (ii) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*), or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there.<sup>3</sup>

This definition or formula has undoubtedly a crabbed appearance. It, however, accurately describes all the circumstances or cases under which a given person, *D*,<sup>4</sup> may, with strict accuracy, be said to have a home in a particular country, *e.g.*, England, or, in other words, in which England can be termed his home, and excludes the cases in which England cannot with accuracy be termed his home. The first clause of the formula or definition describes the conditions under which a home is acquired. The second and third clauses describe the conditions under which a home is retained. The meaning and effect of the whole definition is most easily seen from examples of the cases in which, under it, a country can, and a country cannot, be considered *D*'s home.

The cases to which the formula can be applied are six.

(1) *D* is a person residing in England, without any intention of leaving the country for good, or of settling elsewhere. England is clearly *D*'s home. His position is, in fact, the position of every

<sup>1</sup> It is often, in strictness, rather the *animus revertendi et manendi* than the *animus manendi*.

<sup>2</sup> The term *animus manendi*, or intention of residence, is intended to include the negative state of mind, which is more accurately described as "the absence of any present intention not to reside permanently in a place or country."

<sup>3</sup> More briefly, a person's "home" is "that place or country in which either he resides, with the intention of residence (*animus manendi*), or in which he has so resided, and with regard to which he retains either residence or the intention of residence."

<sup>4</sup> *D* is, throughout this chapter, used to designate the person, either whose domicile is in question, or upon whose domicile a legal right depends, or may be supposed to depend.

ordinary inhabitant. There exists in his case exactly that combination of residence and of purpose to reside required by the first clause of the definition. The time for which his residence may have lasted is immaterial. A person may have resided in a country for a month, for a year, or for ten years; it may have been his residence for a longer or a shorter period; but from the moment when there exists the required combination of residence and intention to reside permanently (*animus manendi*) the country is his home, or, in popular language, he has his home in the country.<sup>1</sup>

(2) *D*, an inhabitant of England, who has hitherto intended to continue residing there, makes up his mind to settle in France. His home, however, continues to be English till the moment when he leaves the country. It is till then retained by the fact of residence, though the *animus manendi* has ceased to exist. *D* intends to abandon, but until he leaves the country, has not actually abandoned England as his home. This is the case of an intended change of home which has not actually been carried out. It falls within the second clause of the definition of home.

(3) *D* is an inhabitant of England, who has for years intended to live permanently in England. He goes to France for business or pleasure, with the intention of returning to England and residing there permanently. England is still his home. It is so because the intention of residence (*animus manendi*) is retained, although *D*'s actual residence in England has ceased.

The case falls precisely within the third clause of the definition of home.

(4) *D* has never, in fact, resided, and has never formed any intention of permanently residing in England. That *D*, under these circumstances, does not possess an English home is too clear for the matter to need comment.<sup>2</sup>

The case is one which obviously does not fall within, and is, in fact, excluded by, the definition already given of a home.

(5) *D*, who has been permanently residing in France, is for the moment in England, but has never formed the least intention

<sup>1</sup> See, as to the relation of time of residence to domicile, comment on Rule 17, *post*. "It may be conceded that if the intention of permanently residing in a place exists, residence in that place, however short, will establish a domicile." *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Chelmsford.

<sup>2</sup> The one apparent exception to this remark is the case of children and others, who have the home of some person (*e.g.*, a parent) on whom they depend. The explanation is that such persons are considered as sharing the home of the person on whom they depend, rather than in strictness possessing a home of their own. See Rule 9 and Sub-Rules 1 and 2, *post*.

of permanent residence there, being a traveller who has come to England for a time to see the country. He clearly has not, either in strictness or in accordance with ordinary notions, a home in England, and it is also clear that his case does not fall within the terms of the definition.

(6) *D*, lastly, is a person who has been permanently residing in France, but has formed an intention of coming to England, where he has not been before, and settling there. He has not yet quitted France. England clearly is not his home, and the case is one manifestly excluded from the terms of the definition.<sup>1</sup>

From our formula, as illustrated by these examples, the conclusion follows that, as a home is acquired by the combination of actual residence (*factum*) and of intention of residence (*animus*), so it is (when once acquired) lost, or abandoned, only when *both* the residence *and* the intention to reside cease to exist. If, that is to say, *D*, who has resided in England as his home, continues either to reside there in fact, or to retain the intention of residing there permanently, England continues to be his home. On the other hand, if *D* ceases both to reside in England and to entertain the intention of residing there permanently, England ceases to be his home, and the process of abandonment is complete. If, to such giving up of a home by the cessation both of residence and of the *animus manendi*, we apply the terms "abandon" and "abandonment," the meaning of the word home may be defined with comparative brevity.

A "home" (as applied to a place or country) means "the place "or country in which a person resides with the *animus manendi*, "or intention of residence, or which, having so resided in it, he "has not abandoned."

This definition or description of a home, in whatever terms it is expressed, gives rise to a remark which will be found of considerable importance. This is that the conception of a place or country as a home is in no sense a legal or a technical idea, since it arises from the relation between two facts, "actual residence" and "intention to reside," neither of which has anything to do with the technicalities of law. A person might have a home in a place where law and Courts were totally unknown, and the question

<sup>1</sup> Cases (4), (5), and (6) are, it may be said with truth, simply cases (1), (2), and (3) looked at, so to speak, from the other side. The six cases or examples, however, describe the six different relations in which a person may stand in respect of residence and *animus manendi* towards a given country, and are each worth observing in reference to questions which may arise as to domicile.



whether a given place is or is not to be considered a particular person's home is in itself a mere question of fact, and not of law.<sup>1</sup>

It is worth while to insist on the non-legal, or natural character of the notion signified by the word "home," because from the definition of a home, combined with knowledge of the ordinary facts of human life, flow several conclusions which have a very close connection with the legal rules determining the nature, acquisition, and change of domicile.

*Results of definition of "home."*—Of these results, flowing from the definition of a home, considered merely as a natural fact, without any reference to legal niceties or assumptions, the following are the principal :—

*First.* The vast majority of mankind (in the civilised parts of the world, at least) have a home, since they generally reside in some country, *e.g.*, England or France, without any intention of ceasing to reside there. It is nevertheless clear (if the thing be looked at merely as a matter of fact, without any reference to the rules of law) that a person may be homeless.<sup>2</sup> There may be no country of which you can at a given moment with truth assert that it is in fact *D*'s home.

*D*, for example, may be an English emigrant, who has left England for good, but is still on his voyage to America, and has not yet reached Boston, where he intends to settle. He has lost his home in England ; he has not gained a home in America. He is in the strictest sense homeless. Here the residence which is the basis of a home does not exist. *D*, again, may be a traveller, who has abandoned his English home, with the intention of travelling from land to land, for an indefinite period, and with the fixed purpose of never returning to England. In this case also *D* is homeless. He has no home, because he does not entertain that intention of residence, which goes to make up the notion of a home. *D*, again, may be a vagabond, *e.g.*, a gipsy who wanders from country to country, without any intention of permanently residing in any one place. Here, again, *D* is homeless, because of the total want of any *animus manendi*.<sup>3</sup>

In these (and perhaps in some other) instances a person is as a

<sup>1</sup> For the bearing of this remark on the law of domicile, see comment on Rule 7, *post* ; *In re Tootal's Trusts* (1883), 23 Ch. D. 532 ; and Westlake (4th ed.), pp. 310—322.

<sup>2</sup> Contrast Rule 2, p. 97, *post*, as to domicile.

<sup>3</sup> See for these cases of homelessness, Savigny, s. 354, Guthrie's transl. (2nd ed.), p. 107.

matter of fact homeless, and if, as we shall find to be the case,<sup>1</sup> he is considered by law to have a home in one country, rather than in another, or, in other words, if he has a domicile, this is the result of a legal convention or assumption. He acquires a home not by his own act, but by the operation of law.

*Secondly.* The definition of home suggests the inquiry, which has, in fact, been sometimes raised in the Courts,<sup>2</sup> whether a person can have more than one home at the same time, or, in other words, whether each of two or more countries can at the same moment be the home of one and the same person?

The consideration of what is meant by "home" shows that (if the matter be considered independently of all legal rules) the question is little more than one of words.

The following state of facts certainly may exist. *D* determines to live half of each year in France and half in England. He possesses a house, lands, and friends, in each country. He resides during each winter in his house in the South of France, and spends each summer in his house in England. His intention is to pursue the same course throughout his life. He entertains, in other words, the intention of continuing to reside in each country for six months in every year.

If the question be asked whether *D* has two homes, the answer is that the question is mainly one of language. If the intention entertained by *D* to reside in each country be not a sufficient *animus manendi* as to each, then *D* is to be numbered among the persons who in fact have no home. If it be a sufficient *animus manendi*, then *D* is correctly described as having two homes.<sup>3</sup>

*Thirdly.* The abandonment<sup>4</sup> of one home may either coincide with, or precede, the acquisition of a new home. In other words, abandonment of one home may be combined with settlement in another home, or else may be the simple abandonment of one home without the acquisition of another.

*D*, for example, goes from England, where he is settled, to France on business. At the moment of leaving England, and on

<sup>1</sup> See Rule 2, p. 97, *post*.

<sup>2</sup> See Rule 3, p. 98, *post*.

<sup>3</sup> The question raised, though almost a verbal one, has given some trouble to writers on domicile. They have here as elsewhere somewhat confused a question of fact and a question of law, and have occasionally failed to distinguish the question of fact, whether *D* can independently of legal rules have two homes, from the legal question, whether it is or is not a rule of law that a man cannot have more than one domicile.

<sup>4</sup> See Rule 8, p. 119, *post*.

his arrival in France, he has the fullest intention of returning thence to England, as his permanent residence. This purpose continues for the first year of his residing in France. *D*, therefore, though living in France, still retains his English home. At the end of the year he makes up his mind to reside permanently in France. From that moment he acquires a French, and loses his English home. The act of acquisition and the act of abandonment exactly coincide. They must, from the nature of the case, be complete at one and the same moment.

The act of abandonment, however, often precedes the act of acquisition. *D* leaves England with the intention of ultimately settling in France, but journeys slowly to France, travelling through Belgium and Germany. From the moment he leaves England his English home is lost, since from that moment he gives up both residence and intention to reside in England, but during his journey no French home is acquired, for, though he intends to settle in France, residence there cannot begin till France is reached. The relation between the abandonment of one home and the acquisition of another deserves careful consideration, for two reasons.

The first reason is, that the practical difficulty of deciding in which of two countries a person is at a given moment to be considered as domiciled arises (in general) not from any legal subtleties, but from the difficulty of determining at what moment of time a person resolves to make a country in which he happens to be living his permanent home. The nature of this difficulty is well illustrated by a reported case. The question to be determined was, whether *D*, who at one time possessed a home in Jamaica, had or had not in the year 1838 acquired a home in Scotland. No one disputed that in 1837 he had left Jamaica for good and was residing in Scotland. It was further undisputed that some years later than 1838 he had acquired a Scotch home or domicile. The matter substantially in dispute was whether at the date in question *D* had made up his mind to reside permanently in Scotland. The case came on for decision in 1868, and *D* himself gave evidence as to his own intentions in 1838. His honesty was undoubted, but the Court, though having the advantage of *D*'s own evidence, found the question of fact most difficult to determine, and in the result took a different view (chiefly on the strength of letters written in 1838) from that taken by *D* himself of what was then his intention as to residence.<sup>1</sup>

<sup>1</sup> *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307. Compare *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

The second reason is, that there exists a noticeable difference between the natural result of abandonment and the legal rule<sup>1</sup> as to its effect. As a matter of fact, a person may abandon one home without acquiring another. As a matter of law, no man can abandon his legal home or domicil without, according to circumstances, either acquiring a new or resuming a former domicil.

*Fourthly.* From the fact that the acquisition of a home depends upon freedom of action or choice, it follows that a large number of persons<sup>2</sup> either cannot, or usually do not, determine for themselves where their home shall be. Thus, young children cannot acquire a home for themselves; boys of thirteen or fourteen, though they occasionally do determine their own place of residence, more generally find their home chosen for them by their father or guardian; the home of a wife is usually the same as that of the husband; and, speaking generally, persons dependent upon the will of others have, in many cases, the home of those on whom they depend. This is obvious, but the fact is worth notice, because it lies at the bottom of what might otherwise appear to be arbitrary rules of law, *e.g.*, the rule that a wife can in no case have any other domicil than that of her husband.<sup>3</sup>

*Domicil not same as home.*—As a person's domicil is the place or country which is considered by law to be his home, and as the law in general holds that place to be a man's home which is so in fact, the notion naturally suggests itself that the word

<sup>1</sup> See Rule 8, p. 119, *post*.

<sup>2</sup> See Rule 9, p. 124, and Sub-Rules, *post*.

<sup>3</sup> From an examination into the meaning of the word "home," when it is strictly employed, we can trace the connection between the word when used with accuracy and its application in various lax or metaphorical senses.

In all cases there exists a more or less distinct reference to the ideas of residence and intention to reside. Thus, when a lodger says he is "going home" to his lodging, the place where he lives is certainly not a permanent residence. Still, the speaker intends to look upon it for the moment in the character of a more or less permanent abode.

A colonist, again, calls England his home. In the mouth of the original settler the expression may perhaps have been used at first with accuracy, and have been an assertion of his intention to return and reside in England (*animus revertendi*).

He or his children continue to use the expression when no real intention to return any longer exists. What is then meant is that the speaker entertains towards England the sentiments which a person is supposed to entertain towards the land which is in reality his home.

In these and like instances may be traced a transition from inaccurate statement of fact to the use of conscious metaphor. What is worth notice is that the ideas of "residence" and of "intention to reside" are not entirely absent from even the metaphorical uses of the word "home."

“domicil” and the word “home” (as already defined) mean in reality the same thing, and that the one is merely the technical equivalent for the other.

“It occurred to me,” says Baron Bramwell, “. . . whether ‘one might not interpret this word ‘domicil’ by substituting the word ‘home’ for it; not home in the sense in which a man who has taken a lodging for a week in a watering-place might say he was going home, nor home in the sense in which a colonist, born in a colony, intending to live and die there, might say he was coming home, when he meant coming to England; but using the word ‘home’ in the sense in which a man might say, ‘I have no home; I live sometimes in London, sometimes in Paris, sometimes in Rome, and I have no home.’”<sup>1</sup>

The notion, however, expressed in the passage cited is fallacious. This idea, that the word home means, when strictly defined, the same thing as the term domicil, is based on the erroneous assumption that the law always considers that place to be a person's home which actually is his home, and on the omission to notice the fact that the law in several instances attributes to a person a domicil in a country where in reality he has not, and perhaps never had, a home. Thus the rule that a domiciled Englishman, who has in fact abandoned England without acquiring any other home, retains his English domicil,<sup>2</sup> or the principle that a married woman is always domiciled in the country where her husband has his domicil, involves the result that a person may have a domicil who has no home, or that a woman may occasionally have her domicil in one country, though she has her real home in another. A person, further, may reside and intend to reside, and therefore in fact have his home, in a country, though on account of the character of the country English Courts may refuse to treat it as his domicil. Thus an Englishman who resides at Shanghai with the intention of residing there permanently, and without any idea of returning to England, dies at Shanghai. He has at the moment of his death a home in China, but he dies not with a Chinese, but with an English domicil.<sup>3</sup> An attempt, therefore, to obtain a complete definition of the legal term domicil by a precise definition of the non-legal term home can never meet with complete success, for a definition so obtained

<sup>1</sup> *Attorney-General v. Rowe* (1862), 31 L. J. Ex. 314, 320, per Bramwell, B.

<sup>2</sup> See Rule 8, *post*.

<sup>3</sup> *In re Tootal's Trusts* (1883), 23 Ch. D. 532, with which compare *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431.

will not include in its terms the conventional or technical element which makes up part of the meaning of the word domicile.<sup>1</sup>

The question may naturally occur to the reader, why is it that the term domicile should not be made to coincide in meaning with the word home, or, in other words, why is it that the Courts consider in some instances that a place is a person's home which is not so in fact?

The answer is as follows: It is for legal purposes of vital importance that every man should be fixed with some home or domicile, since otherwise it may be impossible to decide by what law his rights, or those of other persons, are to be determined. The cases, therefore, of actual homelessness must be met by some conventional rule, or, in other words, a person must have a domicile or legal home assigned to him, even though he does not possess a real one. It is, again, a matter of great convenience that a person should be treated as having his home or being domiciled in the place where persons of his class or in his position would, in general, have their home. The law, therefore, tends to consider that place as always constituting a person's domicile which would generally be the home of persons occupying his position. Thus the home of an infant is generally that of his father, and the home of a wife is generally that of her husband. Hence the rule of law assigning to an infant, in general, the domicile of his father, and to a married woman, invariably, the domicile of her husband.

These considerations of necessity or of convenience introduce into the rules as to domicile that conventional element which makes the idea itself a technical one and different from the natural conception of home. As these conventional rules cannot be conveniently brought under any one head, there is a difficulty in giving a neat definition of domicile as contrasted with home. Since, however, the Courts generally hold a place to be a person's domicile because it is in fact his permanent home, though occasionally they hold a place to be a person's domicile because it is fixed as such by a rule of law, a domicile may accurately be described in the terms of our Rule, and we may lay down that a person's domicile is in general the place or country which is in fact his permanent home,

<sup>1</sup> This conclusion is confirmed by an examination of the received definitions of domicile. They are all, or nearly all, definitions of a domicile of choice, *i.e.*, a domicile acquired by the party's own act, and do not include the cases in which domicile is imposed (independently of the party's choice) by a rule of law; but a "domicile of choice" is nearly, or all but, equivalent to the word "home." As to domicile of choice, see Rule 7, p. 108, *post*. See also App., Note 6, "Definition of Domicil."

though in some cases it is the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

*Comparison of home and domicile.*—The word home denotes a merely natural and untechnical conception, based upon the relation between a person's residence and his intention as to residence. The term domicile is a name for a legal conception, based upon, and connected with, the idea of home, but containing in it elements of a purely legal or conventional character. Whether a place or country is a man's home is a question of fact. Whether a place or country is a man's domicile is a question of mixed fact and law, or rather of the inference drawn by law from certain facts, though in general the facts which constitute a place a man's home are the same facts as those from which the law infers that it is his domicile.

*Area of domicile.*—One remark which is applicable both to home and domicile deserves attention, and has reference to what we may term the "place," or "area," of domicile.

The description given in this treatise of a "home,"<sup>1</sup> as also the definition of "domicil"<sup>2</sup> (for in this point they need not be distinguished), suits, it will be observed, any "place" whatever its limits, and applies equally well to a house or to a country. Thus if *D* resides at No. 1, Regent Street, with the intention of permanently residing in that house, the definition of home suits that house no less than it suits England, and if any legal result were to depend upon *D*'s living at No. 1, Regent Street, rather than in Westminster, the definition of domicile would apply to No. 1, Regent Street, as being the place which is considered by law to be *D*'s home. It will also be observed that, though the words home and domicile, as used in this treatise, are applicable to any place whatever, yet the "place" obviously contemplated throughout the Rules relating to domicile is a "country" or "territory subject to one system of law."<sup>3</sup> The reason for this is that, though the maxims for the determination of a person's domicile are in principle equally applicable, whatever the area or the extent of the place within which a person's domicile is to be determined, the main object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal home or domicile within a territory governed by

<sup>1</sup> See p. 84, *ante*.

<sup>2</sup> See Rule 1, p. 82, *ante*.

<sup>3</sup> See pp. 70, 71, *ante*.

one system of law, *i.e.*, within a given country, rather than within another. When once his domicile in a given country is determined, the question within what part of that country (or law district) he is domiciled becomes, for the purpose of this treatise, immaterial. To decide whether *D* has his legal home in England is important, because upon that fact depends whether certain of his rights are or are not affected by English law. To determine whether *D* has his legal home in Middlesex or in Surrey is, for the purpose of this treatise, unimportant, since in either case he comes within the operation of the same system of law.

If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it might be important to determine whether *D* was domiciled within such particular part, *e.g.*, Brittany, of the whole country, France; but in this case, such part would be *pro tanto* a separate country, in the sense in which that term is employed in these Rules.

It may, indeed, be suggested that the two inquiries, whether *D* is domiciled in England, and whether *D* has his domicile or home in a particular place or house in England, are inevitably connected, because England cannot be *D*'s domicile unless he has a home, or is assumed by law to have a home, at some particular place, or in some particular house, in England. This suggestion rests on the idea that a person cannot be domiciled in a country unless he has a domicile at some particular place in that country. This notion, however, is (it is conceived) erroneous.<sup>1</sup>

It is, of course, obvious that if *D* has a home or domicile in one particular place in a country, he is domiciled in that country, *e.g.*, England, and within any wider area or territory including that country, *e.g.*, the United Kingdom; it is also clear that in this case the reason why *D* is known to be domiciled in England is that he is known to have a home at some definite place in England, *e.g.*, No. 1, Regent Street, where he resides with the intention of residing in that house permanently; but though the fact of a person having a domicile in one part of England establishes for certain and is in general the ground on which you know that he is domiciled in England, the converse does not hold good. *D* may reside in England, with the full intention of residing permanently in England, and may therefore be domiciled there, and this fact

<sup>1</sup> Conf. *Doncet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441, especially judgment of Brett, L. J., p. 457.



may be well known, and capable of proof, and yet there may be no one place in England which can be termed *D*'s home, or domicile, within the terms of our definition.<sup>1</sup> This has been thus laid down, by a Scotch judge:—

“I cannot admit what Lord Fullerton assumes to be the rule, that, in order to make a domicile, it is necessary to have some particular spot within the territory of a law—that it is not enough that the party shall have an apparently continual residence there, but shall actually have a particular spot, or remain fixed in some permanent establishment. In considering the *indicie* of domicile these things are important; but they are not necessary, as matters of general law, to constitute domicile. Many old bachelors never have a house they can call their own. They go from hotel to hotel, and from watering-place to watering-place, careless of the comfort of more permanent residence, and unwilling to submit to the *gêne* attendant on it. There was the case of a nobleman who always lived at inns, and would have no servants but waiters; but he did not lose his domicile on that account.

“If the purpose of remaining in the territory be clearly proved *aliter*, a particular home is not necessary.”<sup>2</sup>

<sup>1</sup> For definition of “home,” see p. 84, *ante*.

<sup>2</sup> *Arnott v. Groom*, Court of Session Cases, 1846, 9 D. 142, p. 150, per Lord Jeffrey. The fact, however, that a person has no one place at which he permanently resides in England may be evidence of his not having the intention to reside permanently in England, and therefore of his not intending to make England his home. “It appears to me,” says Chitty, J., “that I must take into consideration the nature and character of the residence, and it appears that the intestate in this case was moving about England, and I think his shifting about from place to place shows a fluctuating and unsettled mind; and that the fact of residence, although for twenty-two years, standing alone without any other circumstances to show the intention, is insufficient to warrant me in coming to the conclusion that he intended to make England his home. . . . It would be difficult to say that he had any home in England, although . . . it may be considered that, if there was an intention shown by any other acts on his part, such as the purchase of land . . . or any other circumstance, even a slight circumstance, then I should have been warranted in coming to a different conclusion. But as the facts stand, I cannot say that . . . this retired old soldier did intend finally to throw off his Scotch domicile and to make himself, or rather his succession, for that is the only point of any materiality, subject to the law of England.” *In re Patience* (1885), 29 Ch. D. 976, 984, per Chitty, J. This language is not absolutely inconsistent with, but is on the whole opposed to, the doctrine of Lord Jeffrey in *Arnott v. Groom*. The last words (it is submitted) of Mr. Justice Chitty’s judgment must not be understood as laying down that if *A* was domiciled in England, anything depended upon his intention as to succession. The intention as to residence fixes his domicile, but his domicile being once fixed, the law thereof fixes the rules of

The principle laid down in the passage cited is of importance. For if many of the received and best definitions of domicile be adopted, and the unnecessary assumption be also made that a person who is domiciled in a country must be necessarily domiciled at some definite place in that country, the result will follow that persons whom every one will admit to have an English domicile cannot be shown to be domiciled in England.

Take, for example, Story's definition of the term domicile, viz., "that place in which [a person's] habitation is fixed without any "present intention of removing therefrom,"<sup>1</sup> and apply it to the following case: *D* is a Frenchman, settled for years in England, but living in lodgings at Manchester. His full intention is to live permanently in England, but he has no intention of residing more than a limited time in Manchester. His intention may be to spend his life successively in different parts of England, or his purpose may be to go after six months to London, and occupy a house there (which he has already bought) for the rest of his life. Under these circumstances, there is no one place in England which is his home or domicile. Manchester is not his home, because though he resides there, he has not, and never had, as regards Manchester, any intention of permanent residence. No other place in England is his home, because though he may intend to reside in London, he has not begun to reside there in fact. The solution of the difficulty, which might in fact arise with reference, *e.g.*, to the disposition of *D*'s property, if he were to die before leaving Manchester, is that though not domiciled at any one place in England, he has an English domicile, since, with regard to England, there exists on *D*'s part both residence and the *animus manendi*.<sup>2</sup>

succession independently of the intestate's intention. See also *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

Westlake apparently agrees with the view taken in the text that a man may be domiciled in a country without having his domicile at any particular place therein. "Domicile," he writes, "being necessarily connected either with law or with "jurisdiction, or with both, must always be in a territory, though it need not be "at any particular spot in the territory. It may be in England, but need not be at "York or the like; it may be in India, but need not be at Calcutta or the like." Westlake (4th ed.), pp. 321, 322, s. 243. See also *In re Bullen Smith* (1888), 58 L. T. 578, and, above all, *Craigish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

<sup>1</sup> Story, s. 43. See *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441. In this case the testator certainly was domiciled in England, for he "had the intention of residing in England permanently," but it can hardly be said that he was domiciled in his house in London, which he took on a lease for three years.

<sup>2</sup> The fact which should be constantly kept in mind is, that domicile may be defined for different purposes with reference to different areas, and further, that

RULE 2.—No person can at any time be without a domicile.<sup>1</sup>

Comment.

“It is a settled principle that no man shall be without a domicile.”<sup>2</sup> “It is clear that by our law a man must have some domicile,”<sup>3</sup> or (to use the expression of another authority) “it is undoubted law that no man can be without a domicile.”<sup>4</sup>

The principle here laid down is, in effect, that for the purpose of determining a person's legal rights or liabilities, the Courts will invariably hold that there is some country in which he has a home, and will not admit the possibility of his being in fact homeless,<sup>5</sup> or, in other words, even if he is in fact homeless, a home will, for the purpose of determining his legal rights, or those of other persons, always be assigned to him by a presumption or fiction of law. The mode by which this result is achieved will appear from Rules laid down in this chapter.<sup>6</sup> It consists for the most part in the assumption that every one for whom no other domicile can be found retains what is called his domicile of origin,<sup>7</sup>

a person may have a full intention of residence as to one place or area, and not as to any narrower place or area within it. In other words, *D* may have the fullest intention of residing permanently in France or England, but may not have an intention of residing permanently in London or Paris. The question as to the place or area within a country to which a person's intention of residence applies may conceivably become of importance. Thus *D*, a Frenchman, resides at Strasburg in 1870, and goes abroad without any intention of abandoning France as his home. He dies immediately after the cession of Strasburg to Germany. The question (presuming that the Treaty of Cession made no provision for such cases) might arise as to whether *D*'s domicile were French or German at the date of his death. The question ought, according to the principles maintained by the English Courts, to be determined with reference to *D*'s intention. If, on the one hand, it were known that he intended to leave Strasburg, though not to abandon France, his domicile would be French. If, on the other hand, it were known that he intended to reside permanently at Strasburg, his domicile might be maintained to be German. The very question whether a person could be domiciled in a country, without being domiciled in any particular place in it, was, through the separation of Queensland from New South Wales, nearly raised in *Platt v. Attorney-General of New South Wales* (1878), 3 App. Cas. 336, but was not definitely decided.

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 453, 457; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307.

<sup>2</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury.

<sup>3</sup> *Ibid.*, p. 448, per Hatherley, C.

<sup>4</sup> *Ibid.*, p. 453, per Lord Chelmsford.

<sup>5</sup> See as to the principle that not only has a person always a home, but that his home can always be ascertained, Rule 12, p. 136, *post*.

<sup>6</sup> See Rules 4—18, pp. 102—144, *post*.

<sup>7</sup> See Rule 6, p. 104, *post*.

*i.e.*, the domicile assigned to him by a rule of law at the time of his birth, combined with the principle that a domicile is retained until it is changed by the act of the domiciled person himself, or in some cases by the act of a person on whom he is dependent.<sup>1</sup>

RULE 3.—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile (?).<sup>2</sup>

#### Comment and Illustrations.

“It is clear that, by our law, a man must have some domicile, and must have a single domicile.”<sup>3</sup>

The Courts, when called upon to determine rights, *e.g.*, of succession, depending on *D*'s domicile at a given time, will assume as a rule of law that *D* was at the time in question domiciled in some one country only.

Thus the question, who is to succeed to *D*'s property, as far as its decision depends upon the law of *D*'s domicile, will always be determined with reference to the law of one country alone. If it be doubtful whether *D* was at his death domiciled in England or in Scotland, the minutest evidence will be weighed in order to settle in which of the two countries he had his legal home, but our Courts will always decide that he died domiciled in one country only, and will not admit the possibility of his dying domiciled in two countries.

Question.—*Can a person have different domicils for different purposes?*

It is clear that no man can for the same purpose, *i.e.*, when the determination of one and the same class of rights is in question, be taken to have a domicile in more countries than one at the same time.

<sup>1</sup> Rules 4 and 9, pp. 102, 124, *post*.

<sup>2</sup> In support of this Rule, see *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 448; *Somerville v. Somerville* (1801), 5 Ves. 750; 5 R. R. 155; and note especially the absence of any case in which a person has been held to have more than one domicile at the same time. But see *contra*, *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985; *Croker v. Marquis of Hertford* (1844), 4 Moore, P. C. 339.

According to Savigny, a person may have more than one domicile (Savigny, s. 354, Guthrie's transl. (2nd ed.), p. 107). See for a discussion of the whole subject, Phillimore, ss. 51—60.

A doubtful Rule or statement in this Digest is marked with a query.

<sup>3</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 448, per Hatherley, C.

A doubt has, however, been raised, whether a person cannot have at the same moment a domicile in one country for the determination of one class of rights (*e.g.*, rights of succession), and a domicile in another country for the determination of another class of rights (*e.g.*, capacity for marriage).

"I apprehend," says Pollock, C. B., "that a peer of England, who is also a peer of Scotland, and has estates in both countries, who comes to Parliament to discharge a public duty, and returns to Scotland to enjoy the country, is domiciled both in England and Scotland. A lawyer of the greatest eminence, formerly a member of this Court, and now a member of the House of Lords, to whose opinion I, in common with all the profession, attach the greatest importance, once admitted to me that for some purposes a man might have a domicile both in Scotland and England. I cannot understand why he should not."<sup>1</sup>

"The facts and circumstances," writes Phillimore, "which might be deemed sufficient to establish a commercial domicile in time of war, and a matrimonial, or forensic, or political domicile in time of peace, might be such as, according to English law, would fail to establish a testamentary or principal domicile. 'There is a wide difference,' it was observed in a judgment delivered in a recent case before the Judicial Committee of the Privy Council, 'in applying the law of domicile to contracts and 'to wills.'"<sup>2</sup>

If the notion suggested by these authorities be correct, Rule 3 must be modified, and run:—

"No person can, *for the same purpose*, have at the same time more than one domicile."

The Rule, however, as it stands, is probably correct. The notion that a person may be held in strictness to have been domiciled in Scotland for the purpose of determining the validity of his will, and to have been domiciled at the same moment in Germany for the purpose of determining the validity of his marriage (in so far as that depends upon domicile), is opposed to the principles by which the law of domicile is governed, and is not, it is believed, supported by any decided case.

The prevalence of the notion is due to two causes:—

*First.* The term "domicile" is often used in a lax sense,

<sup>1</sup> *In re Capdevielle* (1864), 33 L. J. Ex. 306, 316, per Pollock, C. B. Compare *Somerville v. Somerville* (1801), 5 Vesey, 749a, 786; 5 R. R. 161, per Arden, M. R.

<sup>2</sup> Phillimore, s. 54; *Croker v. Marquis of Hertford* (1844), 4 Moore, P. C. 339.

meaning no more than is meant by the term "residence," as used in this treatise. Thus, a "forensic domicil," or a "commercial domicil,"<sup>1</sup> often signifies something far short of domicil, strictly so called. Now, it is obvious that a person may have a "residence" in one place and a "domicil" in another,<sup>2</sup> and that residence may often be sufficient to confer rights, or impose liabilities.<sup>3</sup> It is from cases in which "residence" alone has been in question that the possibility of contemporaneous domicils in different countries for different purposes has suggested itself. Thus, *D*, though domiciled in France, can, if present in England, be sued in our Courts. This fact has been expressed by the assertion that *D* has a forensic domicil in England,—an expression which certainly countenances the notion that *D* is for one purpose domiciled in England and for another in France. A forensic domicil, however, means nothing more than such residence in England as renders *D* liable to be sued; the co-existence, therefore, of a forensic domicil in one country, and of a full domicil in another, is simply the result of the admitted fact that a person who resides in England may be domiciled in France, and does not countenance the idea that *D* can in strictness be at one and the same moment domiciled both in France and in England.

*Secondly.* The inquiry, which of two countries is to be considered a person's domicil, has (especially in the earlier cases) been confused with the question, whether one person can at the same time have a domicil in two countries.<sup>4</sup>

*D* is a Scotchman. He has a family estate in Scotland. He purchases a house and marries in England, where he generally lives with his wife. He, however, visits Scotland every summer, and goes to his estate there during the shooting season.

On his death in England intestate, a question arises as to the succession to *D*'s movable property.<sup>5</sup>

The question must be decided with reference to the law of Scotland, or of England, according to the view taken of *D*'s domicil.

The decision depends on a balance of evidence. Probably if

<sup>1</sup> See App., Note 7, "Commercial Domicil in Time of War."

<sup>2</sup> *Gillis v. Gillis* (1874), L. R. Ir. 8 Eq. 597.

<sup>3</sup> *E.g.*, to the payment of income tax. *Attorney-General v. Coote* (1817), 4 Price, 183; 16 & 17 Vict. c. 34, s. 2. See App., Note 8, "Limits of Taxation, &c."

<sup>4</sup> See *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341.

<sup>5</sup> Rule 183, p. 664, *post*.

there are no other circumstances than those stated, the Courts will hold him domiciled in England.<sup>1</sup>

*Exception.*—A person within the operation of the Domicile Act, 1861, 24 & 25 Vict. c. 121, may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes.

#### Comment and Illustrations.

The Domicile Act, 1861, empowers the Crown to make with any foreign state a convention to the effect that no British subject resident at the time of his death in the foreign country to which the convention applies, and no subject of such country resident at the time of his death in the United Kingdom, shall be deemed, for the purposes of testate or intestate succession to movables, to have acquired a domicile in the country where he dies, unless he has fulfilled the requirements as to making a written declaration of his intention to become there domiciled, and otherwise, of the Act. This enactment, apparently, applies only to domicile for the purposes of testate or intestate succession, and does not affect a person's domicile for other purposes.

If a convention were made under the Act,<sup>2</sup> *e.g.*, with France, a case such as the following might arise.

*D*, a British subject, who has been domiciled in England, becomes resident and (except in so far as the matter is affected by the Act) acquires a domicile in France. He has not fulfilled the requirements of the Domicile Act, 1861. He dies in France whilst there resident. A question arises as to succession to *D*'s movables.<sup>3</sup> He will be deemed for this purpose not to have acquired a French domicile, but to have retained his English domicile.

A question also arises as to the legitimacy of *D*'s child,<sup>4</sup> born in France, after *D*'s acquisition of a French domicile.

<sup>1</sup> See *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; *Kay*, 341, compared with *Aitchison v. Dixon* (1870), L. R. 10 Eq. 589.

<sup>2</sup> No convention has been made under the Act, which is, therefore, at present a dead letter.

The terms "foreign" and "country" used in the Act have not the precise sense given to these terms in this Digest.

<sup>3</sup> See chap. xxxi., *post*.

<sup>4</sup> See Rule 137, p. 479, *post*.

This question must probably be decided on the view of *D*'s being domiciled in France.

*D*, therefore, will be held for one purpose to have had an English, and for another to have had a French, domicile at the same time.

RULE 4.—A domicile once acquired is retained until it is changed

- (1) in the case of an independent person,<sup>1</sup> by his own act ;
- (2) in the case of a dependent person,<sup>2</sup> by the act of some one on whom he is dependent.

#### Comment and Illustrations.

The principle here enunciated may (it being granted that no one can have more than one domicile) appear too obvious to need statement, but requires to be attended to, as it lies at the bottom of most of the rules as to the acquisition and change of domicile.

*D* is in possession of an English domicile. This domicile he will retain until some act is done, on the part of the person capable of changing it, which amounts to the legal acquisition or resumption by *D* of another domicile.

If *D* is a man of full age, then the person capable of changing his domicile is *D* himself, and *D* will retain his English domicile until some act on his own part which has the legal effect of changing it for, *e.g.*, a French domicile.<sup>3</sup>

If *D* is a minor, the person capable of changing *D*'s domicile is the person on whom *D* is, for this purpose at any rate, dependent, who in most instances is *D*'s father. *D* retains his domicile until some act on the part of his father changes it. The only act, it may even here be added, which can have that effect is a change in the father's own domicile.<sup>4</sup>

<sup>1</sup> See for meaning of term, pp. 73, 74, *ante*.

<sup>2</sup> See for meaning of term, pp. 73, 74, *ante*.

<sup>3</sup> As to the mode in which one domicile can be changed for another, and the difference in this respect between the domicile of origin and a domicile of choice, see Rule 8, p. 119, *post*.

<sup>4</sup> See Rule 9, Sub-Rule 1, p. 125, *post*.



## II. ACQUISITION AND CHANGE OF DOMICIL.

*Domicil of Independent Persons.*<sup>1</sup>

RULE 5.—Every independent person has at any given moment either

- (1) the domicil received by him at his birth (which domicil is hereinafter called the domicil of origin),<sup>2</sup> or,
- (2) a domicil (not being the same as his domicil of origin) acquired or retained<sup>3</sup> by him while independent by his own act (which domicil is hereinafter called a domicil of choice).<sup>4</sup>

## Comment and Illustrations.

Every independent person, which term includes every man or (unmarried) woman, of full age, has at any given moment of his life either the same domicil as that which he received at birth, technically called the domicil of origin, or a different domicil which he has acquired when of full age, by his own act and choice, technically called a domicil of choice.

The fact to be noticed is, that an independent person cannot, by any possibility, be at any time without one or other of these domicils. If he is at any moment not in possession of his domicil of origin, he is in possession of a domicil of choice. If he is at any moment not in possession of a domicil of choice, then he is at that moment in possession of a domicil of origin. That this is so results from the rule of law that any person *sui juris*, who at any moment has no other domicil, is assumed to be in possession of his domicil of origin.<sup>5</sup>

<sup>1</sup> See for meaning of term, pp. 73, 74, *ante*.

<sup>2</sup> See Rule 6, p. 104, *post*. The expression domicil of origin, though borrowed from Roman law, has a different sense from the expression *domicilium originis*. Savigny, ss. 351, 352, Guthrie's transl. (2nd ed.), pp. 88—96.

<sup>3</sup> The word "retained" is inserted to cover the case of a person who on coming of age is in possession of a domicil, not being that of origin, which was acquired for him by his father during infancy. *D* is born in England, where his father, *A*, is then domiciled. During *D*'s infancy his father acquires or resumes a French domicil, and when *D* comes of age is domiciled in France. *D*'s domicil at the moment of his coming of age is French, and is retained as a domicil of choice until *D* does some act whereby he changes his domicil.

<sup>4</sup> See Rule 7, p. 108, *post*.

<sup>5</sup> Compare Rule 8, p. 119, *post*.

*D*'s domicil of origin is, we will suppose, English. What the rule lays down is, that *D*, being an independent person, will at any moment be found to be domiciled either in England or in some other country, such as France, in which he has settled, or acquired for himself a home.<sup>1</sup> It is of course possible (as before pointed out)<sup>2</sup> that *D* may be in fact homeless, as where he has left England for good, and has not yet settled in France, or where, having settled in France, he has left France for good and is on his way to America; but under these circumstances he has his domicil or legal home in England,<sup>3</sup> *i.e.*, he is legally in possession of his domicil of origin.

The two domicils differ from each other in two respects: first, in their mode of acquisition;<sup>4</sup> and secondly, in the mode in which they are changed.<sup>5</sup>

### *Domicil of Origin.*

RULE 6.—Every person receives at (or as from) birth a domicil of origin.<sup>6</sup>

(1) In the case of a legitimate child born during his father's lifetime, the domicil of origin of the child is the domicil of the father at the time of the child's birth.<sup>7</sup>

(2) In the case of an illegitimate<sup>8</sup> or posthumous<sup>9</sup>

<sup>1</sup> Rule 3, p. 98, *ante*, precludes the possibility of *D*'s being domiciled both in England and in France.

<sup>2</sup> See p. 87, *ante*.

<sup>3</sup> See Rule 8, p. 119, *post*.

<sup>4</sup> See Rules 6 and 7, *post*.

<sup>5</sup> See Rule 8, *post*.

<sup>6</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 450, 457; *Munroe v. Douglas* (1820), 5 Madd. 379; *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341; *Dalhousie v. McDonall* (1840), 7 Cl. & F. 817; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Somerville v. Somerville* (1801), 5 Ves. 749 a, 786, 787; 5 R. R. 155; *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *Taucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216; Story, s. 46; Westlake (4th ed.), pp. 322—325; Phillimore, ss. 67—69, 211—228; Savigny, ss. 353, 354, pp. 97—109.

<sup>7</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Dalhousie v. McDonall* (1840), 7 Cl. & F. 817.

<sup>8</sup> *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357; Westlake (4th ed.), p. 323, ss. 246, 247.

<sup>9</sup> See Westlake (1st ed.), p. 35, and compare Jacobs, Law of Domicil, s. 105.

child, the domicile of origin is the domicile of his mother at the time of his birth.

- (3) In the case of a foundling, the domicile of origin is the country where he is born or found.<sup>1</sup>
- (4) In the case of a legitimated person, the domicile which his father had at the time of such person's birth becomes and is considered to be the domicile of origin of such person(?).<sup>2</sup>

#### Comment and Illustrations.

Every person is held by an absolute rule, or fiction, of law to be at birth domiciled, or to have his legal home, in the country in which, at the time of the infant's birth, the person (in most cases the infant's father) on whom the infant is legally dependent is then domiciled.

As to this domicile of origin, the following points require notice :

*First.* The existence of a "domicile of origin" must be considered a fiction or assumption of law.

"The law of England and of almost all civilised countries ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend. International law depends on rules which, being in

<sup>1</sup> Westlake (4th ed.), p. 323, s. 248.

<sup>2</sup> Compare, however, Westlake (4th ed.), p. 323, ss. 246, 247.

“ great measure derived from the Roman law, are common to the  
 “ jurisprudence of all civilised nations. It is a settled principle  
 “ that no man shall be without a domicile, and to secure this result  
 “ the law attributes to every individual as soon as he is born the  
 “ domicile of his father, if the child be legitimate, and the domicile  
 “ of the mother, if illegitimate.”<sup>1</sup>

The aim of the fiction which assigns to every one from the moment of his birth a domicile of origin is to insure that no man shall be at any moment without a legal home<sup>2</sup> in some country, according to the laws of which country his legal rights may be, in many respects, determined; but the rule that a child has from the moment of his birth the domicile of his father is clearly based upon fact, since an infant's home is, generally speaking, the home of his father.

*Secondly.* The domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance. “ I speak,” says an eminent judge, “ of the domicile of origin rather than of birth. I  
 “ find no authority which gives, for the purpose of succession, any  
 “ effect to the place of birth. If the son of an Englishman is born  
 “ upon a journey, his domicile will follow that of his father. The  
 “ domicile of origin is that arising from a man's birth and con-  
 “ nections;”<sup>3</sup> *i.e.*, it is fixed by the domicile of the parent at the time of the child's birth. Thus *D*, the son of an Englishman and a British subject, is born in France, where his father is residing for the moment though domiciled without being naturalised in America. *D*'s domicile of origin is neither English nor French, but American.

(1) *Case of a Legitimate Child.*—A legitimate child born during his father's lifetime has his domicile of origin in the country where the infant's father is domiciled at the moment of the child's birth, for “ the law attributes to every individual as soon as he is born  
 “ the domicile of his father, if the child be legitimate.”<sup>4</sup>

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury. It should be noticed that the opinion of foreign jurists and (to a certain extent) the enactments of foreign codes tend to do away with the distinction between domicile and nationality by making a person's civil, no less than his political, rights depend not on his domicile but on his nationality or allegiance. See, especially, Codice Civile del Regno d' Italia, Art. 6.

<sup>2</sup> See for cases of homelessness in fact, p. 87, *ante*.

<sup>3</sup> *Somerville v. Somerville* (1801), 5 Vesey, 749 a, 786, 787, per Arden, M. R.

<sup>4</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury.

A legitimate child, for example, is born at Boulogne at a moment when his father is domiciled in Scotland. The child's domicil of origin is Scotch.

(2) *Case of Illegitimate<sup>1</sup> or Posthumous<sup>2</sup> Child*.—Such a child has for his domicil of origin the domicil of his mother at the time of his birth.

*D* is an illegitimate child born in France at a time when his father, an Englishman, is domiciled in England, and his mother, a Frenchwoman, is domiciled in France. *D*'s domicil of origin is not English but French.<sup>3</sup>

*D* is a posthumous child, whose father was domiciled at the time of death in England. At the time of *D*'s birth his mother has acquired a domicil in France. *D*'s domicil of origin is French.<sup>4</sup>

(3) *Case of a Foundling*.—*D* is a foundling, *i.e.*, a child whose parents are unknown. He is found in Scotland. His domicil of origin is Scotch.<sup>5</sup>

(4) *Case of a Legitimated Person*.—A person born illegitimate, but afterwards legitimated, *e.g.*, by the subsequent marriage of his parents,<sup>6</sup> stands (after his legitimation) in the position which he would have occupied had he been born legitimate. His domicil of origin is, therefore, apparently the country where his father was domiciled at the time of the legitimated person's birth.

The domicil of origin, however, of a legitimated person is, it must be admitted, open to doubt. The reported cases throw little direct light on the point under consideration, and it may be that even though a child on legitimation takes, if still under age, the domicil of his father, yet his *domicil of origin* remains that of the legitimated person's mother at the time of his birth.<sup>7</sup>

*D* is the child of a Scotch father and an Englishwoman, who are unmarried at the time of his birth. At that moment the domicil of his father is Scotch and of his mother English. A year

<sup>1</sup> Westlake (4th ed.), p. 323.

<sup>2</sup> Westlake (1st ed.), p. 35.

<sup>3</sup> *Re Wright's Trusts* (1856), 25 L. J. Ch. 621; 2 K. & J. 595.

<sup>4</sup> Westlake (1st ed.), p. 35.

<sup>5</sup> This is really rather a result of rules of evidence than a direct rule of law. See Rules 12 and 13, pp. 136, 137, *post*.

<sup>6</sup> See as to *legitimatio per subsequens matrimonium*, Rule 137, *post*.

<sup>7</sup> For a criticism on the rule laid down in Rule 6, clause 4, see Jacobs, *Law of Domicil*, s. 105, note 14. Westlake (4th ed.), p. 323, apparently holds that the domicil of origin of a legitimated person born out of wedlock is the domicil of his mother at the time of his birth, and not the domicil of his father at such time.

or two afterwards, whilst his father is still domiciled in Scotland, *D*'s parents marry. *D*'s domicile of origin probably becomes Scotch, though it may possibly remain English. His actual domicile certainly becomes Scotch, and during minority changes with the domicile of his father.<sup>1</sup>

### *Domicil of Choice.*

RULE 7.—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.<sup>2</sup>

### Comment and Illustrations.

It will be convenient to consider separately the meaning of, and the authorities for, first, the affirmative, secondly, the negative portion of this Rule.

#### (i) *Mode of acquisition.*

*Acquisition by residence and intention of residence.*—Every person begins life as a minor, and therefore as a dependent person. When he becomes an independent person (which can in no case happen before he attains his majority),<sup>3</sup> he will find himself in possession

<sup>1</sup> Compare *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357. See Rule 9, Sub-Rule 1, clause 1, p 125, *post*. *Vaucher v. Solicitor to Treasury, In re Grove* (1888), 40 Ch. D. (C. A.) 216.

<sup>2</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, 458; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 450; *Collier v. Rivaz* (1841), 2 Curt. 855; *Maltass v. Maltass* (1844), 1 Rob. Ecc. 67, 73; *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341; *Haldane v. Eckford* (1869), L. R. 8 Eq. 631; *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13; *Jopp v. Wood* (1865), 34 L. J. Ch. 212; 4 De G. J. & S. 616, 621, 622; *Moorhouse v. Lord* (1863), 10 H. L. C. 272; 32 L. J. Ch. 295; *Huntly v. Gaskell*, [1906] A. C. 56; *Lord Advocate v. Brown's Trustees* (1907), S. C. 333; Story, s. 44; Westlake, pp. 335—338; Phillimore, ss. 203—210.

<sup>3</sup> It may happen later, *e.g.*, in the case of a woman who marries while a minor, and becomes a widow late in life. The age of majority is fixed by English law at 21. By other laws, at other periods, *e.g.*, by Prussian law at 25. A question may arise, as to which no English decision exists, whether a Prussian of 22 will be considered by the English Courts as capable of acquiring a domicile at the age of 21. It may be conjectured that the answer to this inquiry depends, in part at least, on the law of the country where he acquires a domicile. He might be held capable of acquiring an English domicile. A question may also arise as to the domicile of an infant widow. Most probably it is the domicile of her deceased husband at the time of his death.

of a domicile,<sup>1</sup> which will in most cases be his domicile of origin,<sup>2</sup> but may be a domicile acquired by the act of the person on whom he is dependent during infancy.

He can then obtain or retain for himself by his own act and will a legal home, or domicile different from the domicile of origin, and called a domicile of choice. This domicile is acquired by the combination of residence, and the intention to reside, in a given country.

"It may," it has been said, "be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention will establish a domicile."<sup>3</sup> The process by which this new domicile is acquired has been thus aptly described. "A change of [the domicile of origin] can only be effected *animo et facto*—that is to say, by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. [A person] in making this change does an act which is more nearly designated by the word 'settling,' than by any one word in our language. Thus we speak of a colonist settling in Canada, or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicile, in the various judgments pronounced by our Courts."<sup>4</sup> The acquisition, in short, of a domicile of choice is nothing more than the technical expression for settling in a new home or country, and therefore involves the existence of precisely those conditions of act and intention which we have seen to be requisite for the acquisition of a home.<sup>5</sup>

<sup>1</sup> See Rules 9 and 11, pp. 124 and 135, *post*.

<sup>2</sup> If it is not, it becomes immediately his domicile of choice by the process of acquisition described in the text.

<sup>3</sup> *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Cranworth.

<sup>4</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 449, per Lord Chelmsford.

<sup>5</sup> It may, therefore, be thought that the term "domicile of choice" is exactly equivalent to the ordinary expression "home," as already defined (see p. 84, *ante*), but this is not the case. A domicile of choice is always a home, but a home is not always a domicile of choice. For the domicile of origin, being imposed by a rule of law, is never considered as a domicile of choice; though as a matter of fact a person's domicile of origin is, in most instances, a person's actual home. So, again, a person's real home may not, in the eye of the law, be his domicile of choice, since he may be a person who, though in fact capable of choosing a home for himself, is legally incapable of such choice. Thus, minors or married women often do choose homes for themselves, but as they are considered by law incapable of such choice, the home they have in fact chosen is not legally their domicile of choice.

Though, again, the legal conditions necessary for the acquisition of a domicile

“The only principle which can be laid down as governing all questions of domicile is this, that where a party is alleged to have abandoned his domicile of origin, and to have acquired a new one, it is necessary to show that there was both the *factum* and the *animus*. There must be the act, and there must be the intention.”<sup>1</sup>

“A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there.”<sup>2</sup>

It is, in short, admitted in general terms that “the question of domicile is a question of fact and intention.”<sup>3</sup>

Particular attention, therefore, is due to the nature both of the requisite fact, viz., “residence,” and of the requisite “intention.”

(i) *Residence*.—The nature of residence considered as a part of domicile, and thus looked at as a physical fact, independently of the *animus manendi*, has been little discussed.<sup>4</sup> It may be defined (as already suggested) as “habitual physical presence in a place or country.” The word “habitual,” however, must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long

of choice are, in substance, the same as the conditions necessary for the acquisition of a home, these conditions are, for legal purposes, defined with technical precision. The legal theory, further, that every one has a domicile of origin, which is, so to speak, presumably his home, leads to the result that the law requires stronger proof of deliberate intention to acquire a new domicile than would be demanded by any person who, without reference to legal rules, wished to determine whether *D* had or had not left England and settled in Australia; and generally the Courts, in judging whether a man has acquired a domicile of choice, look more to intention, and less to length of residence, than would popular judgment in inquiring whether he had acquired a new home. Thus, it can hardly be doubted either that the decision in *Bell v. Kennedy* (L. R. 1 Sc. App. 307) is legally correct or that it is opposed to ordinary notions. A layman would probably have held that Mr Bell had settled in Scotland.

<sup>1</sup> *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 731, per Kindersley, V.-C.

<sup>2</sup> *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Chelmsford.

<sup>3</sup> *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391, 393, per Wilde, B. See also *Collier v. Rivaz* (1841), 2 Curt. 855; *Maltass v. Maltass* (1844), 1 Rob. Eccl. Rep. 67.

<sup>4</sup> It may be well to note again that residence is often used as including the *animus manendi*, and hence as equivalent to home or domicile. See, e.g., *King v. Foxwell* (1876), 3 Ch. D. 518, 520, for expressions of Jessel, M. R., as to residence, where the term is probably used as including the *animus manendi*. See p. 83, note 1, *ante*. For the difference between residence and domicile, see *Walcot v. Botfield* (1854), Kay, 534, 543, 544.



or short, which the person using the term "residence" contemplates.

The residence which goes to constitute domicile certainly need not be long in point of time. "If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."<sup>1</sup>

The residence must, however, be in pursuance of, or influenced by, the intention. Mere length of residence will not of itself constitute domicile. *D*, a Scotchman, born in Scotland, never leaves England during the last twenty-two years of his life. *D*, however, has never exhibited the intention of settling in England. *D*, therefore, at death retains his Scotch domicile.<sup>2</sup>

This characteristic, however, in common with other qualities which are generally ascribed to residence, concerns not the physical fact of residence, but the mental fact of the choice, purpose, or intention to reside (*animus manendi*).

(ii) *Intention*.—The main problem in determining the nature of domicile,<sup>3</sup> in so far as it depends upon choice, consists in defining the character of the necessary intention or *animus*. The difficulty lies partly in the nature of the thing itself, partly in the different views which Courts and writers have at different times entertained, as to the nature and definiteness of the requisite intention or purpose. The best definition or description of the requisite *animus* appears to be, "the present intention of permanent or indefinite residence in a given country," or (if the same thing be expressed more accurately, in a negative form) "the absence of any present intention of not residing permanently or indefinitely in a given country."<sup>4</sup>

There exists no authoritative definition of the *animus manendi* necessary to the acquisition of a domicile of choice, but there are four points as to its character which deserve notice.

*First. The intention must amount to a purpose or choice.*

The "domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or

<sup>1</sup> *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Cranworth.

<sup>2</sup> *In re Patience* (1885), 29 Ch. D. 976. Conf. *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

<sup>3</sup> See App., Note 6, "Definition of Domicil."

<sup>4</sup> For the substance of this description, see Story, s. 43: and compare the language of Cairns, C., in *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 318. See also judgment of Martin, B., *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391, 395, 396.

"chief residence in a particular place."<sup>1</sup> It must not be "prescribed or dictated by any external necessity."<sup>2</sup> "In order that a man may change his domicile of origin he must choose a new domicile—the word 'choose' indicates that the act is voluntary on his part; he must choose a new domicile by fixing his sole or principal residence in a new country (that is, a country which is not his country of origin), with the intention of residing there for a period not limited as to time."<sup>3</sup>

The expression that the residence must be "voluntary," or a matter of choice, is not in itself a happy one<sup>4</sup> since, supposing a person to make up his mind to settle in a country for an indefinite time, the "motive," whether it be economy, pleasure, or even considerations of health,<sup>5</sup> is indifferent, though certainly the residence would not in some of these cases be termed, in ordinary language, a matter of choice. What, however, is intended to be expressed, and is undoubtedly true, is that the residence must be connected with the distinct purpose, or intention, to reside. In this sense, therefore, there must be a residence of "choice." The mere fact, in other words, of residence, however prolonged, has no effect on the acquisition of domicile, unless the residence is in consequence of an intention to reside. Hence,—to take a familiar example,—residence in a country, arising from sudden illness, as when *D*, domiciled in England, falls ill on a journey through France, and is delayed there from week to week, does not entail a change of domicile.

How far this intention or choice must be distinct or conscious is still an open question.

Some judges have held that it is not necessary, in order to establish a domicile, that a person should have absolutely made up

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

<sup>2</sup> *Ibid.*

<sup>3</sup> *King v. Foxwell* (1876), 3 Ch. D. 518, 520, per Jessel, M. R. Conf. *Briggs v. Briggs* (1880), 5 P. D. 163.

<sup>4</sup> The words "voluntary" or "voluntarily" may easily mislead. Conf. *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357; *In re Marrett* (1887), 36 Ch. D. (C. A.) 400, especially judgment of Cotton, L. J., p. 407.

<sup>5</sup> See *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13, compared with the expressions of Lord Westbury in *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, which seem to imply that a domicile of choice must not be dictated by a desire for "relief from illness." See, as to domicile of invalids when abroad, comment on Rule 18, *post*. A person may change his domicile, though his object in doing so is to defeat his creditors. *In re Robertson*, W. N. 1885, p. 217.

his mind which of two countries is the place where he intends to make his permanent home.

“One word,” says Bramwell, B., “with regard to the intention. [The counsel for the defendant] says, and I think he errs there, that [*D*] did not intend to remain in England, because he contemplated that he might possibly go back to India. I think there is a very common mistake made in such cases, which is the assumption that a man must absolutely intend one of two things, for it may be that he has no absolute intention of doing either. It may be that [*D*] did not contemplate the case at all arising of an opportunity of going back to India. So that, if he had been suddenly appealed to upon the subject, he might have said, ‘I have never thought of it.’ I think, however, it appears here that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention or expression of intention prevented a man having a fixed domicile, no man would ever have a domicile at all, except his domicile of origin.”<sup>1</sup>

Others have laid down that a somewhat more distinct intention must exist. “It must,” it has been said, “be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question [whether a person intended to change his domicile] had arisen in a form requiring a deliberate or solemn determination.”<sup>2</sup>

The difference of view, however, is not, after all, great. The question about the degree of definiteness of purpose which is needed refers rather to the evidence than to the nature of the intention.

*Secondly. The intention must be an intention to reside permanently, or for an indefinite period.*<sup>3</sup>

<sup>1</sup> *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284, 292, per Bramwell, B.

<sup>2</sup> *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 645, per Wickens, V.-C.

<sup>3</sup> It is maintained by a Scotch writer (Fraser, *Husband and Wife* (2nd ed.), p. 1265) that a person cannot change his domicile unless he has the intention to change his civil *status*. This contention is, however, according to English law, erroneous, for it is clear that if *D* leaves England for good and takes up his residence in France with the intention of residing there permanently, he will, by our Courts, be held to have acquired a French domicile, and this, even though he may wish to retain his *status* as an English citizen; nor is it easy to see how, on any view, a change of domicile can be made to depend on the intention to change a

It must be, that is to say, not an intention to reside for a limited time or definite purpose, but “an intention of continuing “to reside for an unlimited time.”<sup>1</sup>

If, for example, *D*, domiciled in England, goes to America for six months, or to finish a piece of business, or even with the intention of staying there only until he has made a fortune,<sup>2</sup> he retains his English domicile. Thus, a residence in a foreign country for twenty-five years<sup>3</sup> will not change a person’s domicile in default of the intention of settling permanently or indefinitely in such foreign country; but it is, of course, “true that residence originally “temporary, or intended for a limited period, may afterwards “become general and unlimited, and in such a case, as soon as the “change of purpose, or *animus manendi*, can be inferred, the fact of “domicil is established.”<sup>4</sup> If *D*, who goes to America, intending to stay there for a limited period, after living there for a year or two, makes up his mind to reside there permanently, he at once acquires an American domicile.

*Thirdly. The intention must be an intention of abandoning, i.e., of ceasing to reside permanently in, the former domicile.*

“The intention must be to leave the place where the party has “acquired a domicile, and to go to reside in some other place as the “new place of domicile, or the place of new domicile.”<sup>5</sup> Indeed, if it be granted that a man can have but one domicile at the same time,<sup>6</sup> it necessarily follows that the purpose, or *animus*, requisite for acquiring a domicile in France must exclude the purpose requisite for retaining a domicile in England.

*Fourthly. The intention need not be an intention to change allegiance.*<sup>7</sup>

person’s civil *status*. Most people, on leaving one country to reside in another, do not, in fact, either contemplate or understand the effect of such residence on their civil *status*. The doctrine, in short, that a change of domicile cannot be effected without the intention to make a change of *status*, appears to be only a slightly different form of the doctrine deliberately rejected by the House of Lords, that a person cannot change his domicile unless he intends *quatenus in illo exuere patriam*.

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury; *The Lauderdale Peerage Case* (1885), 10 App. Cas. 692.

<sup>2</sup> *Jopp v. Wood* (1864), 34 L. J. Ch. 212; 4 De G. J. & S. 616. See, however, *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

<sup>5</sup> *Lyall v. Paton* (1856), 25 L. J. Ch. 746, 749, per Kindersley, V.-C.

<sup>6</sup> See Rule 3, p. 98, *ante*.

<sup>7</sup> See, however, p. 106, note 1, *ante*.

The intention to reside permanently or settle<sup>1</sup> in a country is not the same thing as the intention or wish to become a citizen of that country.

It was, indeed, at one time held that a man could not change his domicile, for example, from England to the United States, without doing at any rate as much as he could to become an American citizen. He must, as it was said, “intend *quatenus in illo exuere patriam*.”<sup>2</sup> But this doctrine has now been pronounced erroneous by the highest authority;<sup>3</sup> and when an Englishman leaves England, where he is domiciled, and goes to the United States, he changes his domicile if he intends to settle in the new country and to establish his principal or sole and permanent home there, even though the legal consequences of his so doing may never have entered his mind;<sup>4</sup> and though he may have had no intention of becoming an American citizen, and has remained a British subject to the end of his life.<sup>5</sup>

(ii) *No other mode of acquisition.*

The concurrence of residence and intention, for however short a time, is essential for the acquisition of a domicile.

“We are all agreed,” it has been said, “that to constitute a domicile, there must be the fact of residence . . . and also a purpose on the part of [*D*] to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary.”<sup>6</sup>

“Residence” alone clearly will not suffice.

This is sufficiently apparent from the ordinary case of persons

<sup>1</sup> See *Winans v. Attorney-General*, [1904] A. C. 287, 299, 300, judgment of Lord Lindley.

<sup>2</sup> *Moorhouse v. Lord* (1863), 32 L. J. Ch. 295, 298; 10 H. L. C. 272, 283, per Lord Cranworth, followed by *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985; *In re Grove, Vaucher v. Solicitor to the Treasury* (1888), 40 Ch. D. (C. A.) 216. Compare, however, Westlake (4th ed.), pp. 326—335.

<sup>3</sup> See *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Brunel v. Brunel* (1871), L. R. 12 Eq. 298.

<sup>4</sup> See especially *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 643, 644, judgment of Wickens, V.-C.

<sup>5</sup> *Brunel v. Brunel* (1871), L. R. 12 Eq. 298; *Winans v. Attorney-General*, [1904] A. C. 287.

<sup>6</sup> *Arnott v. Groom* (1846), 9 D. 142, 149—152, per Lord Jeffrey. Compare *Collier v. Rivaz* (1841), 2 Curt. 855, 857, per Sir H. Jenner. See also *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 450.

travelling, or living abroad, who retain a domicile in a country they may not have seen for years.<sup>1</sup>

“Intention” alone will not suffice.

*D*, who has never resided in Australia, will clearly not acquire a domicile there by the mere intention to reside there.

Nor will the fact that *D* has set forth from England on his voyage to Australia give him an Australian domicile until he arrives there.<sup>2</sup>

This must be noticed, because it was at one time thought<sup>3</sup> that a new domicile could be acquired *in itinere*, i.e., that if *D* left England, intending to settle, e.g., in Australia, he acquired an Australian domicile the moment he quitted England.<sup>4</sup> But this notion is apparently erroneous, and the principle may probably be taken as established, that a domicile of choice can be acquired by nothing short of the concurrence of residence and intention.

From the fact that the acquisition of a domicile of choice depends solely on the co-existence of residence and intention to reside, two important results may be deduced.

*First.* *A person's wish to retain a domicile in one country will not enable him to retain it if, in fact, he resides with the animus manendi in another.*

*D*, an Englishman, originally domiciled in England, resided at Hamburg with the intention of living there for an indefinite period. He wished, however, to retain his English domicile, and coming for a temporary purpose to England, made a will there, in which he declared his intention not to renounce his English domicile of origin. He then returned to Hamburg, and continued living there with the *animus manendi* till his death. *D* had at the time of his death a domicile at Hamburg and not in England.<sup>5</sup>

“I consider,” says Pollock, C.B., “the declaration of the “testator as meaning that he intended to go back to Hamburg “to live and die there, though it was not his intention of never “coming to England again. Probably he wished for two domicils.

<sup>1</sup> See further for cases where there is no change of domicile, because there is residence without the *animus manendi*, comment on Rule 18, p. 144, *post*.

<sup>2</sup> Westlake holds that if in this case England were *D*'s domicile of choice, the leaving England with the intention of permanent residence in Australia would suffice to give *D* an Australian domicile before he arrived in Australia. Westlake (4th ed.), pp. 336, 337, ss. 259, 260.

<sup>3</sup> See expressions of Leach, V.-C., in *Munroe v. Douglas* (1820), 5 Madd. 379, 405.

<sup>4</sup> See further, Rule 8, p. 119, *post*.

<sup>5</sup> *Re Steer* (1858), 3 H. & N. 594; 28 L. J. Ex. 22.

“ But in spite of a lurking desire to return to England, his acts “ show an intention to live and die at Hamburgh, and that is not “ affected by the declaration. . . . That being so, he *could not* “ *help giving up* his English domicile.”<sup>1</sup> “ The testator,” adds Bramwell, B., “ does not say that he had no intention of remaining “ at Hamburgh during his life, but only that *he wished to retain* “ *his English domicile. That he could not do.*”<sup>2</sup>

*Secondly. The acquisition of a domicile cannot be affected by rules of foreign law.*<sup>3</sup>

By the law of some countries, *e.g.*, of France, a person is required to fulfil certain legal requirements before he is considered by the French Courts to be at any rate fully domiciled in France, but if a person in fact resides with the *animus manendi* in France (*i.e.*, is really settled in France), he will be considered by our Courts to be domiciled there, even though he has not complied with the requirements of French law.

*D*, an English peer, lives in France, and as a matter of fact intends to pass the rest of his life in France. He wishes, however, to retain a domicile in England. He occasionally exercises political rights there, and always describes England in formal documents as his domicile. He has not fulfilled the legal requirements of French law already referred to. *D* is domiciled in France.<sup>4</sup>

We must, however, carefully distinguish any question as to the *acquisition* or possession by *D* of a domicile in a particular country, *e.g.*, France, from the different question of the legal *effect* of *D* having acquired, or possessing a domicile in France. The first question must be answered by an English Court in accordance with the rules of English law with regard to the nature, the acquisition, and the change of domicile (*i.e.*, the Rules laid down in this chapter), and must be answered without reference to the law of France. This is distinctly laid down in a case where the question arose, whether a Frenchwoman who, before her marriage, and while domiciled in France had made a will leaving her movables to her sister, did or did not acquire an English domicile on her marriage with a Frenchman residing in London.

“ The domicile of the testatrix must be determined by the “ English Court of Probate according to those legal principles

<sup>1</sup> *Re Steer* (1858), 3 H. & N. p. 599.

<sup>2</sup> *Ibid.*

<sup>3</sup> *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211; *In re Bowes* (1906), 22 T. L. R. 711.

<sup>4</sup> *Hamilton v. Dallas* (1875), 1 Ch. D. 257.

“ applicable to domicile which are recognised in this country and  
 “ are part of its law. Until the question of the domicile of the  
 “ testatrix at the time of her death is determined, the Court of  
 “ Probate cannot tell what law of what country has to be applied.  
 “ The testatrix was a Frenchwoman, but it would be contrary  
 “ to sound principle to determine her domicile at her death  
 “ by the evidence of French legal experts. The preliminary  
 “ question, by what law is the will to be governed, must depend in  
 “ an English Court on the view that Court takes of the domicile of  
 “ the testatrix when she died. If authority for these statements  
 “ is wanted, it will be found in *Bremer v. Freeman*,<sup>1</sup> *Dogliani v.*  
 “ *Crispin*,<sup>2</sup> and *In re Trufort*.<sup>3</sup> In each of the last two cases a  
 “ foreign Court had determined the domicile, and the English  
 “ Court had also to determine it, and did determine it to be the  
 “ same as that determined by the foreign Court. But, as I under-  
 “ stand those cases, the English Court satisfied itself as to the  
 “ domicile in the English sense of the term, and did not simply  
 “ adopt the foreign decisions. The course universally followed  
 “ when domicile has to be decided by the Courts of this country  
 “ proceeds upon the principles to which I have alluded.”<sup>4</sup>

The second question, when it has been found by the English Court that *D* has acquired or possesses a domicile, in the English sense of that term, must be answered solely with regard to the law of France, and this without any reference to the legal effect of domicile under the law of England.<sup>5</sup>

In the case already mentioned,<sup>6</sup> it was found by the Court that the testatrix became on her marriage domiciled in England, and hence that her will was, in accordance with English law, revoked

<sup>1</sup> (1857), 10 Moore, P. C. 306.

<sup>2</sup> (1866), L. R. 1 H. L. 301.

<sup>3</sup> (1887), 36 Ch. D. 600.

<sup>4</sup> *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 227, Lindley, L. J. But contrast *In re Johnson*, [1903] 1 Ch. 821, and App., Note 1, “Law of a Country and the *Renvoi*.”

<sup>5</sup> This I conceive to be the meaning of Westlake's statement: “If an establishment “ be made in any country in such manner that by English law it would fix the “ domicile there, still no effect which the law of that country does not allow to it “ can be allowed to it in the character of domicile in England. In other words, “ no one can acquire a personal law in the teeth of that law itself.” Westlake (4th ed.), p. 326, s. 254. See for meaning of the term “law of a country,” Intro., pp. 6, 7, *ante*, and also chap. i., p. 79, *ante*. *Bremer v. Freeman* (1857), 10 Moore, P. C. 306; *Collier v. Rivaz* (1841), 2 Curt. 855; *Hamilton v. Dallas* (1875), 1 Ch. D. 257.

<sup>6</sup> *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211.



by the marriage. If it had been found that the testatrix on her marriage retained her French domicile, then the effect of the marriage would have been determined in accordance with French law (*lex domicilii*).<sup>1</sup>

### *Change of Domicil.*

#### RULE 8.<sup>2</sup>

- (1) The domicile of origin is retained until a domicile of choice is in fact acquired.
- (2) A domicile of choice is retained until it is abandoned, whereupon either
  - (i) a new domicile of choice is acquired; or
  - (ii) the domicile of origin is resumed.

#### Comment and Illustrations.

An independent person<sup>3</sup> retains a domicile in a country where he has once acquired it until he has (in the strict sense of the term "abandonment") abandoned<sup>4</sup> that country by giving up, not only his residence there but also his intention to reside there, or, to use untechnical language, until he has left the country for good. But, though a domicile is never changed without actual abandonment of an existing domicile, the legal effect of a man's having left a country where he is domiciled for good differs according as the domicile is a domicile of origin or a domicile of choice.

(1) *Domicil of origin.—How changed.*—"Every man's domicile of origin must be presumed to continue, until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies on the party who asserts that change."<sup>5</sup> "It is a clear principle of law, that the domicile of origin continues until another domicile is acquired, *i.e.*, till the person whose domicile is in question has made a new home for himself in lieu of the home of his birth."<sup>6</sup>

<sup>1</sup> *I.e.*, it would have been held that the will was not revoked.

<sup>2</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307. It requires apparently stronger evidence to establish the intention to abandon a domicile of origin than the intention to abandon a domicile of choice. *Winans v. Attorney-General*, [1904] A. C. 287, and *Huntly v. Gaskell*, [1906] A. C. 56.

<sup>3</sup> For meaning of term "independent person," see p. 73, *ante*.

<sup>4</sup> See p. 86, *ante*.

<sup>5</sup> *Aikman v. Aikman* (1861), 3 Macq. 854, 877, per Lord Wensleydale.

<sup>6</sup> *Ibid.* p. 863, per Lord Cranworth.

The meaning of these expressions is that a domicile of origin cannot be simply abandoned. If *D* is in possession of an English domicile of origin, he may indeed in fact abandon England as his home without in reality settling elsewhere, but, in the eye of the law, he cannot give up or get rid of his domicile of origin until he has in fact changed it for another by settling in another country. Though in reality homeless, he will, until he settles elsewhere, be considered to have his legal home or domicile in England.

*D*, the descendant of a Scotch family, had a domicile of origin in Jamaica. In 1837, after he came of age, he sold his estates in Jamaica and left the island, to use his own expression, for good. He then went to Scotland, and was resident there during 1838, but without making up his mind whether to settle in Scotland or not. The question came before the Courts whether on the 28th September, 1838, *D* was or was not domiciled in Scotland. The Court of Session held that he had then acquired a Scotch domicile. But the House of Lords, reversing the decision of the Court of Session, held that *D* still remained domiciled in Jamaica.

Their decision was based on the ground that though *D* was on the 28th September, 1838, resident in Scotland, he had not at that moment any fixed or settled purpose to make Scotland his future home; that, in short, he was resident in Scotland, but without the *animus manendi*, and therefore had not acquired a Scotch domicile, but still retained his domicile of origin, *i.e.*, was domiciled in Jamaica.<sup>1</sup>

(2) *Domicil of choice.*—*How changed.*—A domicile of choice or a home is retained<sup>2</sup> until both residence (*factum*) and intention to reside (*animus*) are in fact given up, but when once both of these conditions have ceased to exist, it is abandoned as well in law as in fact.

Of the principle that a domicile of choice is retained until actual abandonment, the following case affords a good illustration:

*D*, a widow, whose domicile of origin was English, acquired by marriage a domicile in France. After her husband's death she determined to return to England as her home. She went on board an English steamer at Calais, but was seized with illness, and before the vessel left the harbour, re-landed in France, where after some months (though wishing to return to England) she

<sup>1</sup> *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307; see especially, judgment of Lord Westbury, pp. 320, 321, 322.

<sup>2</sup> See pp. 88—90, *ante*.

died, having been unable on account of ill-health to leave France. *D* retained her French domicile. "I cannot think," it was laid down, "that there was a sufficient act of abandonment, so long as the deceased remained within the territory of France, her acquired domicile."<sup>1</sup>

The case is an extreme one, but was clearly well decided; it exactly illustrates the principle that a domicile of choice is retained until actual residence in a country is brought to an end. So, again, *D*, an Englishman, who had acquired a domicile of choice in Germany, returned for a time to England, but retained the intention to reside permanently in Germany. He did not lose his German domicile.<sup>2</sup> This case illustrates the principle that a domicile once acquired is retained until the intention to reside is brought to an end. To use, in short, technical language, the domicile of choice is retained, either *facto* or *animo*.<sup>3</sup>

The principle, on the other hand, that actual abandonment of such a domicile puts an end to its existence, not only in fact, but in law, has been judicially stated in the following terms:

"It seems reasonable to say, that if the choice of a new abode and actual settlement there constitute a change of the original domicile, then the exact converse of such a procedure, viz., the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned."<sup>4</sup>

(i) *Acquisition of new domicile of choice*.—The abandonment of one domicile of choice may, as a matter of fact, coincide with the acquisition of another.<sup>5</sup> *D*, for example, whose domicile of origin is English, has acquired a domicile of choice in France. He goes to Germany, intending to reside there for a short time, and, therefore, on arriving in Germany, still retains his French domicile of choice.

<sup>1</sup> *In Goods of Raffinell* (1863), 32 L. J. P. & M. 203, 204, per Sir C. Cresswell.

<sup>2</sup> *Re Steer* (1858), 28 L. J. Ex. 22; 3 H. & N. 594.

<sup>3</sup> But it is not sufficient for the abandonment of a domicile of choice that a man should be simply dissatisfied with it and intend to leave it. "If a man loses his domicile of choice, then, without anything more, his domicile of origin revives; but in my opinion, in order to lose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it, with the intention of leaving it permanently. Unless he has done that, unless he has left it both *animo et facto*, the domicile of choice remains." *In re Marrett* (1887), 36 Ch. D. (C. A.) 400, 407, judgment of Cotton, L. J.

<sup>4</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 450, per Hatherley, C.

<sup>5</sup> See p. 88, *ante*.

But after residing in Germany for some time, he makes up his mind to reside there permanently; at that moment, both his French domicil of choice is abandoned, and a German domicil of choice is acquired.

So far there is no difference between a domicil of origin and a domicil of choice; either may be abandoned simultaneously with the actual acquisition of another domicil.

(ii) *Resumption of domicil of origin*.—A person in possession of a domicil of choice may abandon it, and at the same moment, in actual fact, resume his domicil of origin. This case presents no peculiarity, and is, in its essential features, exactly like the case already considered, of *D*'s in fact abandoning one domicil of choice simultaneously with the acquisition of another.

But another state of circumstances is possible. A person may, as a matter of fact, abandon a home or domicil of choice in one country without in fact acquiring a home in another.<sup>1</sup>

*D*, for example, whose domicil of origin is English, has an acquired home or domicil of choice in France. He leaves France for good, without any intention of returning to England, or of settling in any country whatever. He is in fact homeless. As, however, no one can in the eye of the law be without a domicil,<sup>2</sup> it is a matter of logical necessity that, in order to give *D* a domicil, one of two fictions should be adopted.

It might, in the first place, be held, that in the case of an acquired, as of an original domicil, any existing domicil was retained until another was actually acquired; or, to take *D*'s particular case, that *D* retained his French domicil, until he in fact settled in some other country. This view, however, which was at one time adopted by our Courts, is now rejected.<sup>3</sup>

It might, in the second place, be held that on the simple abandonment of a domicil of choice, the domicil of origin is by a rule of law at once resumed or re-acquired, and this is the view now adopted by English tribunals.

*D*, for example, when he leaves France for good, without any intention of settling elsewhere, immediately re-acquires his English domicil. For the true doctrine is, that the domicil of origin reverts from the moment that the domicil of choice is given up. "This is a necessary conclusion, if it be true that an acquired "domicil ceases entirely whenever it is intentionally abandoned,

<sup>1</sup> See pp. 87, 89, 90, *ante*.

<sup>2</sup> See Rule 2, p. 97, *ante*.

<sup>3</sup> See *Munroe v. Douglas* (1820), 5 Madd. 379.

“and that a man can never be without a domicile. The domicile of origin always remains, as it were, in reserve, to be resorted to in case no other domicile is found to exist.”<sup>1</sup>

Hence, whenever a person in fact abandons a domicile of choice, without actually acquiring a new domicile of choice, his domicile of origin is always resumed; for either he resumes it in fact, or if he does not do so in fact, he is assumed by a rule of law to resume or re-acquire it.

The precise difference in this matter between a domicile of origin and a domicile of choice may be seen from the following illustration :

An Englishman whose domicile of origin is English, and a Scotchman whose domicile of origin is Scotch, are both domiciled in England, where the Scotchman has acquired a domicile of choice. They leave England together, with a view to settling in America, and with the clearest intention of never returning to England. At the moment they set sail their position is in matter of fact exactly the same; they are both persons who have left their English home, without acquiring another. In matter, however, of law their position is different; the domicile of the Englishman remains English, the domicile of the Scotchman becomes Scotch. The Englishman retains his domicile of origin, the Scotchman abandons his domicile of choice, and re-acquires his domicile of origin. If they perish intestate on the voyage, the succession<sup>2</sup> to the movables of the Englishman will be determined by English law, the succession to the movables of the Scotchman will be determined by Scotch law. The Englishman will be considered to have his legal home in England, whilst the Scotchman will be considered to have his legal home in Scotland.<sup>3</sup>

The distinction pointed out in Rule 8 between a domicile of origin and a domicile of choice is borne out by the decision of the House of Lords in *Udny v. Udny*. *D*'s domicile of origin was Scotch. He settled in England, and acquired there a domicile of choice; he then abandoned England as his home, and went to reside at Boulogne, without, however, intending to settle or becoming domiciled in France. It was held that under these circumstances *D* resumed his Scotch domicile of origin at the moment when he left England.<sup>4</sup>

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 454, per Lord Chelmsford.

<sup>2</sup> See Rule 183, p. 664, *post*.

<sup>3</sup> But see as to Westlake's dissent, p. 116, note 2, *ante*.

<sup>4</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441. This is the leading case on the

Rule 8 applies only to the domicile of independent persons. An infant, for example, may lose his domicile of origin without, in fact, acquiring a home or domicile of choice in any country.

Thus *D* is the infant son of *M*, whose domicile of origin is English. At *D*'s birth, *M* is domiciled in France. *D*'s domicile of origin is therefore French.<sup>1</sup> *M* leaves France for good, taking *D* with him, and intending to settle in America. During the voyage across the Atlantic, *M*'s domicile,<sup>2</sup> and therefore *D*'s,<sup>3</sup> is English; but *D* has never resided in England, and is, in fact, homeless. *D* therefore has changed his domicile of origin without the acquisition of a home in any country.

It is easy to work out a similar result in the case of a wife.

### *Domicil of Dependent Persons (Minors and Married Women).*

RULE 9.—The domicile of every dependent person<sup>4</sup> is the same as, and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependent.<sup>5</sup>

#### Comment.

The general principle here stated is, that a person not *sui juris*, such as a minor or a wife, has the domicile of the person on whom he or she is considered by law to be dependent.

The words "if at all" should be noticed. They are intended to meet the position of a dependent person whose domicile cannot, at the moment, be changed at all. Such is the position of a minor without parents or guardians. He cannot change his domicile himself, for he is not independent. It cannot at the moment be changed for him, because there is no person in existence on whom he is legally dependent.

The operation of the Rule is seen from the resulting Sub-Rules.

change of domicile, and taken together with *Bell v. Kennedy*, L. R. 1 Sc. App. 307, contains nearly the whole of the law on the subject. The judgment of Lord Westbury, pp. 458, 459, should be particularly studied.

<sup>1</sup> See Rule 6, p. 104, *ante*.

<sup>2</sup> See pp. 122, 123, *ante*.

<sup>3</sup> See Rule 9, and Sub-Rule 1, *post*.

<sup>4</sup> For meaning of "dependent person," see p. 73, *ante*.

<sup>5</sup> See especially, Westlake (4th ed.), pp. 323—325; Savigny, s. 353, Guthrie's transl. (2nd ed.), pp. 97—106. For further authorities, see notes to Sub-Rule 1, p. 125, *post*, and Sub-Rule 2, p. 132, *post*.

SUB-RULE 1.—Subject to the exceptions hereinafter mentioned, the domicile of a minor is during minority determined as follows:—

- (1) The domicile of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicile of his father.<sup>1</sup>
- (2) The domicile of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicile of the mother(?).<sup>2</sup>
- (3) The domicile of a minor without living parents, or of an illegitimate minor without a living mother, possibly is the same as, and changes with, the domicile of his guardian, or may be changed by his guardian(?).<sup>3</sup>

#### Comment and Illustrations.

(1) *Case of legitimate minor*.—A child's domicile during minority changes, while the father is alive, with the domicile of the father.

*D* is the legitimate son of a domiciled Englishman,<sup>4</sup> and is himself born in England. When *D* is ten years old, his father

<sup>1</sup> *Somerville v. Somerville* (1801), 5 Ves. 749*a*; 5 R. R. 155; *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611; *Forbes v. Forbes* (1854), Kay, 341; 23 L. J. Ch. 724, 726, 727; *In re Macreight* (1885), 30 Ch. D. 165; *In re Beaumont*, [1893] 3 Ch. 490.

<sup>2</sup> *Pottinger v. Wightman* (1817), 3 Mer. 67; 17 R. R. 20; *In re Beaumont*, [1893] 3 Ch. 490. See also the American cases, *Holyoke v. Haskins*, 5 Pick. 20; *School Directors v. James*, 2 Watts & Serg. 568; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 361; and the Scotch case, *Arnott v. Groom* (1846), 9 D. 142. See Wharton, ss. 41, 42.

<sup>3</sup> *Pottinger v. Wightman* (1817), 3 Mer. 67; 17 R. R. 20; *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 66, language of Lyndhurst, C.; 138—140, judgment of Lord Campbell; *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611, 617; *In re Beaumont*, [1893] 3 Ch. 490. But these authorities refer almost wholly to the authority of a mother to change the domicile of a child whose father is dead, and hardly determine what is the authority in that respect of a guardian. Compare especially, Westlake (4th ed.), pp. 323, 324, and see pp. 128, 129, *post*.

<sup>4</sup> The expression "domiciled Englishman or Englishwoman, domiciled Frenchman or Frenchwoman," &c., means a man or woman domiciled in England, or a man or woman domiciled in France, &c.

emigrates to America and settles there. *D* is left at school in England.<sup>1</sup> *D* thereupon acquires an American domicile.

*D* is the infant son of Scotch parents, domiciled in Scotland, who marry after *D*'s birth. *D* is thereby legitimated. His father then, while *D* is still a minor, acquires an English domicile. *D*'s domicile thereupon becomes English.<sup>2</sup>

(2) *Case of minor who is illegitimate, or whose father is dead.*—The domicile of an illegitimate child, or of a child whose father is dead, is, during his minority, if he lives with his mother,<sup>3</sup> probably the same as, and (subject to the possible effect of Exception 1)<sup>4</sup> changes with, the domicile of his mother.

*D* is the illegitimate son of a domiciled Englishman and a Frenchwoman, domiciled at the time of *D*'s birth in England.<sup>5</sup> The mother, when *D* is five years old, goes with him to France, and resumes her original French domicile. *D* acquires a French domicile.

There was at one time a doubt whether, after the death of the father, the children, remaining under the care of the mother, followed her domicile, or, until the end of their minority, retained that which their father had at the time of his death. The case, however, of *Pottinger v. Wightman*<sup>6</sup> must now be taken conclusively to have settled the general doctrine, that (subject at any rate to the exceptions hereinafter mentioned) if, after the death of the father, an unmarried infant lives with his mother, and the mother acquires a new domicile, it is communicated to the infant.<sup>7</sup>

The principle on which the domicile of a minor may be changed through the acquisition of a new domicile by his mother, when a widow, appears to be this: The domicile of the minor does not in strictness follow, as a matter of law, the domicile of his mother, but may be changed by her, for "the change in the domicile of an

<sup>1</sup> See especially, *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 337, 381, judgment of Cotton, L. J.; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 360.

<sup>2</sup> *Uday v. Uday* (1869), L. R. 1 Sc. App. 441. On this point there is no doubt. The domicile of a legitimated minor is during his minority clearly that of his father. The only doubt is how far legitimation affects the domicile of origin of the legitimated person. See pp. 104, 105, 107, *ante*.

<sup>3</sup> If he does not live with his mother, his domicile need not necessarily change together with hers. *In re Beaumont*, [1893] 3 Ch. 490.

<sup>4</sup> See p. 130, *post*.

<sup>5</sup> See, as to England being *D*'s domicile of origin, Rule 6, p. 104, *ante*.

<sup>6</sup> 3 Mer. 67.

<sup>7</sup> *Johnstone v. Brattie* (1843), 10 Cl. & F. 42. 138, judgment of Lord Campbell. See *In re Beaumont*, [1893] 3 Ch. 490; *Phillimore*, ss. 115—119.



“ infant which, as is shown by the decision in *Pottinger v. Wightman*,<sup>1</sup> may follow from a change of domicile on the part of the mother, is not to be regarded as the necessary consequence of a change of the mother’s domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile.”<sup>2</sup>

The position of a widow, then, with regard to her child, who is a minor, may be thus described: She may change her own domicile and settle with him in another country. She in this case, in fact, changes the minor’s domicile, but she does not, as a matter of law, change his domicile simply by changing her own. Thus, a widow is left, on the death of her husband, with three children, who are minors. She and they are domiciled in Scotland. She afterwards settles in England with her two eldest children and acquires an English domicile. The two eldest children, thereupon, become domiciled in England. The youngest child, *D* (though occasionally visiting his mother), remains and resides permanently in Scotland until he attains his majority. *D* retains his Scotch domicile.<sup>3</sup>

*Questions as to effect of widow’s change of domicile.*—Difficult questions may, however, be raised as to the effect of a widow’s change of domicile on that of her children, when she is not their guardian. Such questions may refer to the two different cases of minors who reside and of minors who do not reside with their mother.

*First question.*—Suppose that a minor resides with his mother, who is not his guardian. The question may be raised whether the domicile of the minor is determined by that of the mother, or by that of the guardian. No English case absolutely decides the precise point, but it may be laid down with some confidence that even if a guardian can in any case change the domicile of his ward, yet the domicile of a child living with his mother, whilst still a widow, will be that of the mother and not of the guardian.<sup>4</sup>

*Second question.*—Suppose that a minor resides away from his mother, who is not his guardian. The question whether it is on

<sup>1</sup> 3 Mer. 67.

<sup>2</sup> *In re Beaumont*, [1893] 3 Ch. 480, 496, 497, judgment of Stirling, J.

<sup>3</sup> See *In re Beaumont*, [1893] 3 Ch. 490. This case is not quite decisive, as the widow changed her domicile in consequence of re-marriage.

<sup>4</sup> See American cases, *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347; *Holyoke v. Haskins*, 5 Pick. 20; *School Directors v. James*, 2 Watts & Serg. 568.

his mother or his guardian that the change of the child's domicile depends presents some difficulty. In the absence of decisions on the subject, it is impossible to give any certain answer to the inquiry suggested. It is quite possible that, whenever the point calls for decision, the Courts may hold that there are circumstances under which a minor's domicile must be taken, even in the lifetime of the mother, to be changed by the guardian.

These questions, and others of a similar character, really raise the general inquiry whether, as a matter of law, a minor's domicile is identified with that of his widowed mother, to the same extent to which it is identified with that of his father during the father's lifetime?

To this general inquiry a negative answer must, as already pointed out,<sup>1</sup> be given. There are various circumstances under which the Courts will hold that a minor, in spite of a change of domicile on the part of his mother, retains the domicile of his deceased father. Still, in general, the rule appears to hold good that the domicile of a minor, whose father is dead, usually in fact changes with the domicile of the child's mother.<sup>2</sup>

*D* is the son of a person domiciled in Jersey. When *D* is ten years old his father dies. *D*'s mother leaves Jersey, taking *D* with her, and settles and acquires a domicile in England. *D* thereupon acquires an English domicile.<sup>3</sup>

(3) *Case of minor without living parents*.—It is possible that the domicile of an orphan follows that of his guardian, but whether this be so or not is an open question.<sup>4</sup>

In the first place, it may be doubted<sup>5</sup> whether the rule is not rather that a ward's domicile can be changed, in some cases, by his guardian, than that it follows the domicile of his guardian. It is difficult to believe that the mere fact of *D*'s guardian acquiring for himself a domicile in France can deprive *D*, the son of a domiciled Englishman, of his English domicile.

In the second place, the power of a guardian to change at all the domicile of his ward is doubtful. In the leading English case on the subject,<sup>6</sup> the guardian was also the mother of the children. As

<sup>1</sup> See p. 127, *ante*.

<sup>2</sup> *In re Beaumont*, [1893] 3 Ch. 490.

<sup>3</sup> See *Pottinger v. Wightman* (1817), 3 Mer. 67; compare *In re Beaumont*, [1893] 3 Ch. 490.

<sup>4</sup> See, however, Westlake (4th ed.), pp. 324, 325, s. 250.

<sup>5</sup> This doubt is strengthened by *In re Beaumont*, [1893] 3 Ch. 490.

<sup>6</sup> *Pottinger v. Wightman* (1817), 3 Mer. 67.

a matter of common sense, it can hardly be maintained that the home of a ward is, in fact, or ought to be, as a matter of convenience, identified with the home of his guardian, in the same way in which the home of a child is naturally identified with that of his father. Should the question ever arise, it will possibly be held that a guardian cannot<sup>1</sup> change the domicile of his ward, and almost certainly that he cannot do this unless the ward's residence is, as a matter of fact, that of the guardian.<sup>2</sup>

*D* is the orphan son of a domiciled Englishman. *M* is *D*'s guardian. *M* takes *D* to reside in Scotland, where *M* himself settles and acquires a domicile. *D* possibly acquires a Scotch domicile.

Sub-Rule 1 may, perhaps, be extended to the domicile of an adult, who, though he has attained his majority, has never attained sufficient intellectual capacity to choose a home for himself. From the language used by the Court in one case, it would appear that such a person may be considered to occupy a condition of permanent minority.

*D*, in the case referred to, was the son of an Englishman domiciled in Portugal. There never was a period when *D*, though he attained his majority, could think and act for himself in the matter of domicile otherwise than as a minor could. After *D* became of age, his father acquired an English domicile. Under these circumstances, the effect of the father's change of domicile had to be considered, and the law on the subject was thus laid down:—

“I am assuming that [*D*] was of unsound mind throughout his majority,—in other words, that there never was a period during which he could think and act for himself in the matter of domicile otherwise than as a minor could. And if this be so, it would

<sup>1</sup> “It seems doubtful whether a guardian can change an infant's domicile. The difficulty is that a person may be guardian in one place and not in another.” *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 625, per Wickens, V.-C. See, as to the position of a guardian, Rules 133—135, pp. 475—478, *post*.

<sup>2</sup> On the Continent it is generally held that the minor's domicile is fixed by the father's death, and cannot be changed during minority by the mother or guardian, except by act of law. The preponderating opinion in England and America is, that such a change by a surviving parent will be sustained by the Courts, when it is made reasonably and in good faith. Wharton, s. 41; and see American cases, *School Directors v. James*, 2 Watts & Serg. 568; *Holyoke v. Haskins*, 5 Pick. 20; *White v. Howard*, 52 Barb. 294. The leading English case is *Pottinger v. Wightman* (1817), 3 Mer. 67. It does not appear to be approved by Story, s. 506, note 1, and on the whole I have considerable doubt whether the Continental rule will not be ultimately maintained by our Courts. For discussion of whole question, see Jacobs, *Law of Domicil*, ss. 249—256.

“ seem to me that the same reasoning which attaches the domicile of  
 “ the son to that of his father while a minor would continue to bring  
 “ about the same result, after the son had attained his majority, if  
 “ he was continuously of unsound mind. The son in this case  
 “ continued under the control of his father, was presumably  
 “ supported by him, and, if he had not already been in England  
 “ when his father returned hither in 1843, would, it may reasonably  
 “ be presumed, have been brought with him. At no period could  
 “ he, according to the hypothesis [that he was continuously of  
 “ unsound mind] have acted for himself in choosing a domicile, and  
 “ if his next of kin and those who had the control of his move-  
 “ ments and life were not capable of changing his domicile, that  
 “ domicile would, from the moment of his majority, have become  
 “ indelible. The better opinion, in my judgment, is, that the  
 “ incapacity of minority never having in this case been followed  
 “ by adult capacity, continued to confer upon the father the right of  
 “ choice in the matter of domicile for his son, and that in 1843, . . .  
 “ that right was exercised by the adoption of an English domicile  
 “ for himself which drew with it a similar domicile for his son.”<sup>1</sup>

The extension of the general rule applies only to persons of continuously unsound mind. If a son on attaining his majority enjoys a period of mental capacity, he can acquire a domicile for himself. Whether, if he became incapable, his acquired domicile could be changed, is a matter of doubt. The question in his case is the same as the inquiry which is hereinafter considered,<sup>2</sup> how far the domicile of a lunatic can be changed during lunacy.

*Exception 1 to Sub-Rule.*<sup>•</sup>—The domicile of a minor is not changed by the mere re-marriage of his mother.<sup>3</sup>

#### Comment.

If an infant's father dies, the infant's domicile “ follows, in the  
 “ absence of fraud, that of its mother, until such time as the  
 “ mother re-marries, when, by reason of her own domicile being

<sup>1</sup> *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611, 618, judgment of Sir J. P. Wilde. The case is not decisive, as the Court held that if the son was capable of choosing a domicile, he had, as a matter of fact, chosen that of his father.

<sup>2</sup> See comment on Rule 18, p. 144, *post*.

<sup>3</sup> See American cases, *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347; *Brown v. Lynch*, 2 Bradf. Surrogate Rep. (N. Y.) 214. Compare, as to American views, *Jacobs, Law of Domicil*, s. 244. But contrast *In re Beaumont*, [1893] 3 Ch. 490.

“subordinate” to that of her husband, that of the infant ceases to “follow any further change by the mother, or, in other words, “does not follow that of its stepfather.”<sup>1</sup> This doctrine laid down in an American case is to a certain extent followed by our Courts, with the result that an infant domiciled in England at the time of his mother’s re-marriage as a general rule retains the domicile which he had immediately before the mother’s re-marriage.<sup>2</sup>

But the American doctrine is not to be followed to its full extent. It is reasonable to hold that the fiction which assigns to a woman on marriage the domicile of her husband should not be extended so as necessarily to give to stepchildren the domicile of their stepfather; but it is less easy to see why it should be held that a widow, on re-marriage, loses all control over the domicile of her infant children, born during her first marriage.<sup>3</sup>

Our Courts, therefore, hold<sup>4</sup> that while the re-marriage of a widow, whereby she acquires a new domicile, does not of itself affect the domicile of her infant children, yet if a woman after her second marriage in fact changes her domicile, *e.g.*, from England to Germany, and takes the infant children of her first husband with her, they, too, acquire a German domicile.<sup>5</sup>

The father and mother of a minor are, at the death of the father, domiciled in England. The widow retains her English domicile until her marriage in England with a Frenchman resident in England, but domiciled in France. She thereby acquires a French domicile. The minor retains his English domicile.

The father and mother of *D*, a minor, are at his birth domiciled in England. The father dies, and the mother thereupon, when *D* is two years old, goes with him to Germany, marries a German, and acquires a German home and domicile. *D* resides with his mother. *D*, perhaps, acquires a German domicile.

*Exception 2 to Sub-Rule.*—The change of a minor’s home by a mother or a guardian does not, if made with a fraudulent purpose, change the minor’s domicile.

<sup>1</sup> *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347, 360, *per curiam*.

<sup>2</sup> The same principle applies to the marriage of the mother of an illegitimate infant.

<sup>3</sup> *In re Beaumont*, [1893] 3 Ch. 490. See judgment of Stirling, J., p. 497, where this remark is approved.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

## Comment.

A mother or guardian, perhaps, cannot change the domicile of a minor when the change of home is made for a fraudulent purpose, *e.g.*, to affect the distribution of a minor's estate, in case of his death.<sup>1</sup> The existence, however, of this exception is open to doubt.

*D*, a minor, whose father is dead, is domiciled in England. *M*, the minor's mother, expecting him to die, takes him to Jersey, and acquires a domicile there, in order that the succession to *D*'s property may be according to the law of Jersey, and not according to that of England.

It is doubtful whether *D*'s domicile does not remain English.

SUB-RULE 2.—The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband.<sup>2</sup>

## Comment.

A woman, of whatever age, acquires at marriage the domicile of her husband, and her domicile continues to be the same as his, and changes with his, throughout their married life.

The fact that a wife actually lives apart from her husband,<sup>3</sup> that they have separated by agreement,<sup>4</sup> that the husband has been guilty of misconduct, such as would furnish defence to a suit by him for restitution of conjugal rights,<sup>5</sup> does not enable the wife to acquire a separate domicile. It is an open question whether

<sup>1</sup> See *Pottinger v. Wightman* (1817), 3 Mer. 67.

<sup>2</sup> *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11; *Re Daly's Settlement* (1858), 25 Beav. 456; 27 L. J. Ch. 751. Compare Westlake, p. 325, s. 253; Story, s. 46; Phillimore, ss. 73—78; Wharton, s. 43; Savigny, s. 357. Westlake lays down that the domicile of a wife, not judicially separated *a mens et thoro*, is that of her husband, p. 325, s. 253; and apparently inclines to the opinion that such separation, not amounting to divorce, may possibly enable her to establish a separate domicile. The authority, however, for this suggestion is slight. Foote (3rd ed. p. 61) holds that a wife, when deserted by her husband, retains the matrimonial domicile, although the husband may have acquired a fresh domicile elsewhere, and cites *Armstrong v. Armstrong*, [1898] P. 178. But this case does not support Foote's contention, as the Court there held that jurisdiction to decree separation did not depend upon domicile. See *Armstrong v. Armstrong*, pp. 187, 188.

<sup>3</sup> *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

<sup>4</sup> *Dolphin v. Robins* (1859), 7 H. L. C. 390.

<sup>5</sup> *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11.

even a judicial separation (not amounting to a divorce) would give a wife the power to acquire a domicile for herself.<sup>1</sup> "If," says Lord Kingsdown, "any expressions of my noble and learned friend<sup>2</sup> have been supposed to lead to the conclusion, that his impression was in favour of the power of the wife to acquire a foreign domicile [not her husband's], after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House."<sup>3</sup>

*D*, an Englishwoman, married *M*, a domiciled Englishman. After some years they agreed to live separate, and ultimately obtained a divorce, which, however, was not valid, from the Scotch Courts. *D*, after the supposed divorce, resided in France, and during *M*'s lifetime married *N*, a domiciled Frenchman. *M*, her English husband, remained domiciled in England till *D*'s death in France. *D*, at her death, was domiciled in England and not in France.<sup>4</sup>

RULE 10.—A domicile cannot be acquired by a dependent person through his own act.<sup>5</sup>

#### Comment and Illustration.

A person who is not *sui juris* may, as a matter of fact, acquire an independent home. Thus *D*, an infant of eighteen, emigrates to Australia, buys a farm, and settles there. He in fact makes a home for himself in Australia. So, again, if *D*, a married woman, has entirely ceased to live with her husband (who resides in England), and goes and settles in Germany, with the intention of passing the rest of her life there, it is clear that she has in fact acquired an independent German home. What the rule in effect lays down is that there is a distinct difference, in the point under

<sup>1</sup> *Dolphin v. Robins*, 7 H. L. C. 390, 420; *Le Sueur v. Le Sueur* (1877), 1 P. D. 139; 2 P. D. 79.

<sup>2</sup> Lord Cranworth.

<sup>3</sup> 7 H. L. C. 420, judgment of Lord Kingsdown.

<sup>4</sup> *Dolphin v. Robins* (1859), 29 L. J. P. & M. 11; 7 H. L. C. 390.

<sup>5</sup> *Somerville v. Somerville* (1801), 5 Ves. 749 a, 787, judgment of Arden, M. R. The case of a female infant who changes her domicile on marriage, as where an Englishwoman of eighteen marries a domiciled Frenchman, may perhaps be held to afford a verbal exception to this Rule. This is not a real exception. The change is not affected by the infant's act, but by a consequence attached by law to the *status* arising from her act.

consideration, between a home and a domicile, and that though an infant or a wife may sometimes in fact, as in the cases supposed, acquire a home, neither of them can acquire an independent domicile.

(1) *Minor*.—It is certain that, as a general rule, no one can during his minority acquire a domicile for himself.<sup>1</sup>

It has, however, been suggested<sup>2</sup> that a man, though a minor, may possibly acquire a domicile for himself by marriage, or by setting up an independent household. The reason for this suggested exception to the general rule is that a married minor must be treated as *sui juris* in respect of domicile, since on his marriage he actually founds an establishment separate from the parental home. This reason must, if valid, extend to all cases in which a minor in fact acquires an independent domicile, and it is not satisfactory. It involves some confusion between domicile and residence,<sup>3</sup> and derives no support from the view taken by English law as to an infant's liability on his contracts, which is in no way affected by his marriage. The reasoning, therefore, by which the suggested exception is supported may be held unsound, and the existence of the exception itself be deemed open to the gravest doubt.

(2) *Married Woman*.—Though a wife may acquire a home for herself, she can under no circumstances have any other domicile or legal home than that of her husband.<sup>4</sup>

SUB-RULE.—Where there is no person capable of changing a minor's domicile, he retains, until the termination of his minority, the last domicile which he has received.<sup>5</sup>

<sup>1</sup> *Somerville v. Somerville* (1801), 5 Ves. 749 *a*, 787, judgment of Arden, M.R. Conf. *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357, 383, 384, judgment of Lindley, L. J., pp. 384, 385, judgment of Lopes, L. J.; Jacobs, *Law of Domicil*, s. 229.

<sup>2</sup> See Savigny, Guthrie's transl. (2nd ed.), s. 353, p. 100, and compare Westlake (1st ed.), s. 37, with Westlake (4th ed.) p. 324, s. 249. See also *Stephens v. McFarland* (1845), 8 Ir. Rep. 444.

<sup>3</sup> See p. 83, *ante*.

<sup>4</sup> *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11; *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; 29 L. J. P. & M. 34.

<sup>5</sup> See Rules 4—10, pp. 102—133, *ante*.



**Illustration.**

*D* is a minor, who at the death of his father has an English domicile. His mother is dead, and he has no guardian. *D* cannot change his own domicile, there is no person capable of changing it. *D* therefore retains his English domicile.

RULE 11.—The last domicile which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act.

**Comment.**

This is an obvious result of Rule 4.<sup>1</sup> It applies to the case, first, of a person who attains his majority, and secondly, of a wife whose coverture is determined either by death or by divorce.

SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during his minority until he changes it.<sup>2</sup>

**Illustration.**

*D* is the son of *M*, a domiciled Englishman. While *D* is a minor, *M* emigrates to America. *D* thereupon acquires an American domicile. When *D* attains his majority, *M* is still domiciled in America. *D* retains his American domicile until by his own act he either resumes his English domicile, or acquires a new, *e.g.*, a French domicile.

SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it.<sup>3</sup>

**Illustrations.**

1. *D*, a woman whose domicile of origin is English, is married to a German domiciled in Prussia. Her husband dies. *D* continues living in Prussia. *D* retains her Prussian domicile.

<sup>1</sup> See p. 102, *ante*.

<sup>2</sup> A possible question may be raised as to domicile of an infant widow. Probably it remains that of her husband, and cannot be changed (except in consequence of re-marriage) till she comes of age.

<sup>3</sup> See Story, s. 46, citing Dig. Lib. 50, tit. 1, l. 38, s. 3; *Gout v. Zimmermann* (1847), 5 Notes of Cases, 440, 455; Jacobs, Law of Domicil, s. 222.

2. *D*, after the death of her German husband, leaves Prussia to travel, without any intention of returning to Prussia. *D* resumes her English domicile of origin.

3. *D*, after the death of her German husband, settles in France with the intention of residing there permanently. *D* acquires a French domicile.

4. *D*, after the death of her German husband, marries at Berlin an American domiciled at New York. *D* acquires a domicile at New York.

SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of divorce, until she changes it.

#### Comment.

The position of a divorced woman is for the present purpose the same as that of a widow.

### III. ASCERTAINMENT OF DOMICIL <sup>1</sup>

#### *Domicil—How Ascertained.*

RULE 12.—The domicile of a person can always be ascertained by means of either

- (1) a legal presumption; or
- (2) the known facts of the case.

#### Comment.

Even on the assumption that every one has at all times a domicile, there may often (if the thing be considered without reference to rules of law) be a difficulty in determining where a given person, *D*, had his home or domicile at a particular moment. The difficulty may arise from ignorance of the events of *D*'s life, or from the circumstance that the facts which are known to us leave it an open question whether *D* was at a given moment (say at the date of his death) domiciled in England or in Scotland. Under such circumstances, an inquirer who had

<sup>1</sup> The *criteria* or proofs of domicile are most fully investigated, Phillimore, ss. 211—351.

no other object than the investigation of truth, and who was neither aided nor trammelled by legal rules, would, if he tried to ascertain where *D* was domiciled at the date of his death, be forced to acquiesce in the merely negative conclusion that *D*'s domicile at that date could not be ascertained. To this negative result the Courts, from obvious motives of convenience, refuse to come,<sup>1</sup> and will always, however slight or inconclusive in itself may be the character of the evidence placed before them, determine in what country *D* was at a given moment domiciled.

This result is obtained partly by the use of certain legal presumptions,<sup>2</sup> partly, where the claims of each of two places to be *D*'s domicile are on the known facts of the case all but equally balanced, by allowing the very slightest circumstance<sup>3</sup> to turn the scale decisively in favour of the one rather than of the other.<sup>4</sup> Hence (though the fact is not always realised by writers on domicile) the process by which a person's domicile is determined by the Courts has a somewhat artificial character.

### *Legal Presumptions.*

RULE 13.—A person's presence in a country is presumptive evidence of domicile.

#### **Comment.**

"A person's being in a place is *prima facie* evidence of his "being domiciled there, and it lies on those who say otherwise "to rebut this presumption."<sup>5</sup> "The actual place where [a "man] is, is *prima facie* to a great many given purposes, his "domicil."<sup>6</sup> Hence the importance often attached in questions of domicile to the place of birth and to the place of death.

*Place of birth.*—The place of a man's birth has in itself no necessary connection with the place of his domicile, for though *D* be born in England, yet if *D*'s father is then domiciled in France,

<sup>1</sup> Contrast this with the absence of any legal presumption as to the moment at which a death takes place. *In re Phend's Trusts* (1870), L. R. 5 Ch. 139; *In re Walker* (1871), L. R. 7 Ch. 120; *Mason v. Mason* (1816), 1 Mer. 308.

<sup>2</sup> See Rules 13, 14, *post*.

<sup>3</sup> See Rules 15—18, pp. 139—144, *post*.

<sup>4</sup> Compare *In re Patience* (1885), 29 Ch. D. 976; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617; *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

<sup>5</sup> *Bruce v. Bruce* (1790), 2 B. & P. 229, 231, per Lord Thurlow.

<sup>6</sup> *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198, 301, per Loughborough, C.

*D*'s domicile of origin is not English but French.<sup>1</sup> If, however, nothing be known about *D*'s domicile except the fact of his birth in England, this fact is ground for a presumption that *D*'s domicile at the moment of his birth, and, therefore, *D*'s domicile of origin, was English.

It is, of course, on this ground that a foundling,<sup>2</sup> of whom nothing is known but the fact of his being found within the limits of a particular country, *e.g.*, England, acquires a domicile of origin in that country.

*Place of death.*—The place of a person's death in no way of itself affects his domicile, but the fact that he was present in a particular country at the moment of his death is, in the absence of any proof to the contrary, ground for a presumption of his being then domiciled in that country.

“A man [it has been said]<sup>3</sup> is *prima facie* domiciled at the “place where he is resident at the time of his *death*; and it is “incumbent on those who deny it to repel the presumption of law, “which may be done in several ways. It may be shown that [*D*] “was there as a traveller, or on some particular business, or on a “visit, or for the sake of health; any of which circumstances will “remove the impression that he was domiciled at the place of his “death.”

The principle here laid down is sound. Where, indeed, there is a balance of evidence between the claims of two possible domicils, the place of a man's death is irrelevant. For “there is not a “single dictum, from which it can be supposed that the place of the “*death* in such a case as that shall make any difference. Many “cases are cited in *Denisart* to show, that the death can have no “effect; and not one, that that circumstance decides between two “domicils;”<sup>4</sup> but if nothing which throws light on a man's domicile be known, then his death at a place is important, as giving rise to the application of the general principle that the place where a person *is* must, in the absence of counter evidence, be assumed to be his domicile.

<sup>1</sup> See Rule 6, p. 104, *ante*.

<sup>2</sup> *Ibid*.

<sup>3</sup> In an American case, *Guier v. O'Daniel*, 1 Binney's Rep. 349, note. See *Phillimore*, s. 235.

<sup>4</sup> *Somerville v. Somerville* (1801), 5 Vesey, 749 a, 788, per Arden, M. R. See also *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *Craigie v. Lewin* (1843), 3 Curt. 435.

RULE 14.—When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile.<sup>1</sup>

#### Illustration.

*D* is proved to have been domiciled in Scotland in 1870. If in 1879 it be alleged that *D*'s domicile is not Scotch, the person who makes this allegation must prove it. *D*'s domicile in Scotland, that is to say, is presumed to continue until a change is proved.<sup>2</sup>

#### *Facts which are Evidence of Domicil.*

RULE 15.—Any circumstance may be evidence of domicile which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country.

#### Comment.

As domicile consists of, or is constituted by, residence and the due *animus manendi*, any fact from which it may be inferred either that *D* "resides," or has the "intention of indefinite residence," within a particular country is, as far as it goes, evidence that *D* is domiciled there.

"There is," it has been said, "no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in

<sup>1</sup> See *Munro v. Munro* (1840), 7 Cl. & F. 842, 891; *Aikman v. Aikman* (1861), 3 Macq. 854, 877; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 642, 643.

For the special difficulty of proving the loss of a domicile of origin, see *Wmans v. Att.-Gen.*, [1904] A. C. 287; and *In re De Almeida*, W. N. (1901) p. 142.

<sup>2</sup> This principle of evidence must be carefully distinguished from the legal rules that every one retains his domicile of origin until another domicile is acquired, and resumes it whenever an acquired domicile is simply abandoned. See Rule 8, p. 119, *ante*. These are simply conventional rules of law, resorted to in order to maintain the general principle that no person can be without a domicile. See Rule 2, p. 97, *ante*. Compare *In re Patience* (1885), 29 Ch. D. 976; and *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

“his lifetime,”<sup>1</sup> and the cases with regard to disputed domicile bear out this dictum.

There is no transaction in the course of a person's life which the Courts have not admitted (for whatever it is worth) in evidence of his domicile.<sup>2</sup> Hence presence in a place,<sup>3</sup> time of residence,<sup>4</sup> the mere absence of proof that a domicile once acquired has been changed,<sup>5</sup> the purchase of land,<sup>6</sup> the mode of dealing with a household establishment,<sup>7</sup> the taking of lodgings,<sup>8</sup> the buying of a burial place,<sup>9</sup> the deposit of plate and valuables,<sup>10</sup> the exercise of political rights,<sup>11</sup> the way of spelling a Christian name,<sup>12</sup> oral or written expressions<sup>13</sup> of intention to make a home in a particular place, or from which such an intention, or the absence of it, may be inferred, have all been deemed matters worth consideration in determining the question of a person's domicile.

While, however, it is true that there is no circumstance in a man's life which may not be used as evidence of domicile, it is also true that there are two classes of facts, viz., first, “expressions of intention,” and secondly, “residence,” which are entitled to special weight, as evidence of the matter<sup>14</sup> which, in questions of domicile,

<sup>1</sup> *Drevon v. Drevon* (1864), 34 L. J. Ch. 129, 133, per Kindersley, V.-C. For the different inferences as to domicile deducible from the same facts, compare the judgment of the Court of Appeal in *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617, with the judgment of Pearson, J., in the Court below (1884), 26 Ch. D. 656.

<sup>2</sup> See, especially, *Drevon v. Drevon* (1864), 34 L. J. Ch. 129; *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13; *Aitchison v. Dixon* (1870), L. R. 10 Eq. 589; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617; *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285; *In re Patience* (1885), 29 Ch. D. 976; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

<sup>3</sup> *Bruce v. Bruce* (1790), 2 B. & P. 229; *Bempde v. Johnstone* (1796), 3 Vesey, 198.

<sup>4</sup> *The Harmony* (1800), 2 C. Rob. 322.

<sup>5</sup> *Munro v. Munro* (1840), 7 Cl. & F. 842, 891.

<sup>6</sup> *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985.

<sup>7</sup> *Somerville v. Somerville* (1801), 5 Vesey, 749 a.

<sup>8</sup> *Craigie v. Lewin* (1843), 3 Curt. 435.

<sup>9</sup> *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985.

<sup>10</sup> *Curling v. Thornton* (1823), 2 Add. 6, 18; *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285.

<sup>11</sup> *Brunel v. Brunel* (1871), L. R. 12 Eq. 298.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307; *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441.

<sup>14</sup> No special rules can be given as to the evidence of a person's residence in a particular place. Residence is a physical fact, to be proved in the same way as any other physical fact, e.g., the commission of an assault. The mode, therefore, in which the fact is to be proved, calls for no special notice in this work.

it is generally most difficult to establish, viz., the existence of the necessary *animus manendi*, and that certain rules, though of a very general character, may be laid down as to the effect of such facts in proving the existence of such intention.<sup>1</sup>

RULE 16.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicile.<sup>2</sup>

#### Comment and Illustration.

A person's intention with regard to residence may be inferred from his expressions on the subject. These expressions may be direct, as where *D* says or writes that it is his purpose to settle in Scotland. They may be indirect, as where *D* by his acts, *e.g.*, the purchase of a burial-ground at Edinburgh, intimates an intention of acquiring or keeping a Scotch home.

*D*, an English peer, who had lived for some time in France, expressed in a letter a deliberate intention of never returning to England. He also accepted the jurisdiction of a French Court, on the ground, expressed in a letter to his attorney, of his being *bonâ fide* domiciled in France, and added, "I have no domicile in England or any other country excepting the one [France] from which I now write."<sup>3</sup> These expressions, combined with other circumstances, were, after *D*'s death, held to prove that he was in fact domiciled in France.

Direct expressions, however, of intention may be worth little as evidence.<sup>4</sup> The person who uses them may not know what constitutes a domicile. He may call a place his home, simply because he often lives there. He may wish to be, or to appear, domiciled in one country, while in fact residing permanently and intending so to reside, *i.e.*, being domiciled, in another. A direct statement, in short, that *D* considers himself domiciled, or to have his home in France, though it may sometimes be important, may often carry little weight. This remark specially applies to the description

<sup>1</sup> See Rules 16—18, *post*.

<sup>2</sup> See *Hamilton v. Dallas* (1875), 1 Ch. D. 257; *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307.

<sup>3</sup> *Hamilton v. Dallas* (1875), 1 Ch. D. 257, 259.

<sup>4</sup> See *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441.

which a person gives of himself in formal documents, as, *e.g.*, “*D* residing in France.”<sup>1</sup>

A person’s purpose may be more certainly inferred from his acts than from his language. Thus the fact that *D* keeps up a large establishment in England,<sup>2</sup> that he occupies a particular kind of house,<sup>3</sup> that he deposits his plate and valuables there,<sup>4</sup> and a hundred other circumstances, may be indicative of a purpose to live permanently in England, and, therefore, be evidence of his having an English domicile.

RULE 17.—Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*), and in so far evidence of domicile.<sup>5</sup>

#### Comment.

“Residence,” though not the same as domicile, is not only one of the elements which go to make up domicile, but is also in many cases the main evidence for the existence of the other element which constitutes domicile, viz., the *animus manendi*. “Residence alone has no effect *per se*, though it may be most important, as “a ground from which to infer intention.”<sup>6</sup> But the effect of residence as evidence depends both on the *time* and on the *mode* of residence.

*Time*.—Time or length of residence does not of itself constitute domicile.<sup>7</sup> An ambassador, for example, might reside thirty years in the country of the Court to which he is sent, without acquiring a domicile in a foreign country. Nor does the law of England, like some other systems, prescribe a definite length of residence,

<sup>1</sup> *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391; 1 H. & C. 12; *Hamilton v. Dallas* (1875), 1 Ch. D. 257; *Udny v. Udny* (1869), L. R. 1 Sc. App. 441.

<sup>2</sup> *Somerville v. Somerville* (1801), 5 Vesey, 749 a; *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341.

<sup>3</sup> *Craigie v. Leitch* (1843), 3 Curt. 435.

<sup>4</sup> *Curling v. Thornton* (1823), 2 Add. 619.

<sup>5</sup> *Munro v. Munro* (1840), 7 Cl. & F. 842; *The Harmony* (1800), 2 C. Rob. 322. Compare *In re Patience* (1885), 29 Ch. D. 976, and *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

<sup>6</sup> *Munro v. Munro* (1840), 7 Cl. & F. 842, 877, per Cottenham, C.

<sup>7</sup> *In re Patience* (1885), 29 Ch. D. 976; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) p. 617. Thus a person who has a domicile of origin in England does not lose it and acquire a Scottish domicile simply by making his home in Scotland for many years, unless, in the circumstances of the case, his doing so clearly shows his intention to abandon his English domicile of origin. *Huntly v. Gaskell*, [1906] A. C. 56.



*e.g.*, ten years, after which a person shall be assumed to have acquired a domicile in a particular country. On the other hand, no length of time is necessary for the acquisition of a home or domicile. *D* emigrates to America, with the intention of settling there, and actually begins his residence there; he forthwith acquires an American domicile. But time, which is not an element of domicile, is the most important evidence of domicile; a residence, that is to say, by *D* for thirty years in England is strong evidence of his purpose to reside there, and therefore of his having an English domicile. This is the sense in which the following well-known passage is to be understood:—

“Time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects;<sup>1</sup> in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicile. That is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may probably* or *does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach though the fact may be true) on the laws of this country, that it may last as long as himself. . . . I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred, in such a case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility.”<sup>2</sup>

<sup>1</sup> *I.e.*, as evidence of domicile.

<sup>2</sup> *The Harmony* (1800), 2 C. Rob. 322, 324, 325, per Sir W. Scott. It should be

The effect of time must not be exaggerated. It is weighty as evidence, but it is not more than evidence of domicile.<sup>1</sup>

*Mode.*—The effect of residence in a country as evidence of a man's intention to continue residing there depends, to a great extent, on the manner of his residence.

If *D* not only lives in France but buys land there, and makes that country the home of his wife and family, there is clearly far more reason for inferring a purpose of residence on his part, than if he has merely taken lodgings in Paris, and lives there alone.

The presence, indeed, of a man's wife and family is sometimes spoken of as decisive,<sup>2</sup> which it certainly is not; but this and various less important facts, such as the place where a man educates his children<sup>3</sup> or exercises his political rights,<sup>4</sup> indicate, though they do not prove, a fixed residence, and thus go to make up the evidence for domicile.

RULE 18.—Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*animus manendi*).<sup>5</sup>

#### Comment and Illustrations.

If *D* resides in France, this residence is *prima facie* evidence of his intending to reside there, and, therefore, of his having a French domicile; so, further, if *D*, who has been a domiciled Englishman, takes up his residence in France, the fact of his dwelling in France gives, especially if he lives there for a long time, a *prima facie* reason for believing that he intends to make France his home, and, therefore, intends to acquire, and has

noticed that this passage refers to what is known as a "commercial domicile" during the period of war, and that time is of much more consequence in determining the existence of such a domicile than in determining the existence of a domicile properly so-called. See App., Note 7, "Commercial Domicil in Time of War."

<sup>1</sup> See *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 732, judgment of Kindersley, V.-C.; *In re Grove* (1888), 40 Ch. D. 216, 226, judgment of Stirling, J.

<sup>2</sup> *Douglas v. Douglas* (1871), L. R. 12 Eq. 617; *Forbes v. Forbes* (1854), Kay, 341.

<sup>3</sup> *Haldane v. Eckford* (1869), L. R. 8 Eq. 631.

<sup>4</sup> *Brunel v. Brunel* (1871), L. R. 12 Eq. 298.

<sup>5</sup> See *Jopp v. Wood* (1865), 4 De G. J. & S. 616; 34 L. J. Ch. 212; *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285, 329, 330; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357.

acquired, a French domicile. But if *D*, having been a domiciled Englishman, resides in France under circumstances which preclude the possibility of the residence being the result of any purpose on his part to reside permanently in France (as, for example, if *D* is an English prisoner of war, kept captive in France), or which make it at any rate probable that *D* means to retain his English domicile (as where *D* lives at Paris as an English ambassador to the French Court), then *D*'s residence is no proof whatever of his intention to reside in France as his home, and he may be presumed to retain his English domicile.

The law on this point has been laid down authoritatively.

" We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long, and so continuous, as to raise a presumption nearly, if not quite, amounting to a *presumptio juris et de jure*; a presumption not to be rebutted by declarations of intention, or otherwise than by actual removal. Such was the case of *Stanley v. Bernes*.<sup>1</sup> The foundation of that decision, in this respect, was, that a Portuguese domicile had been acquired by previous residence and acts, and that mere declarations of intention to return could not be sufficient to prove an intention not to acquire a Portuguese domicile.

" In short, length of residence *per se* raises a presumption of intention to abandon a former domicile, but a presumption which may, according to circumstances, be rebutted.

" It would be a dangerous doctrine to hold that mere residence, apart from the consideration of circumstances, constitutes a change of domicile. A question which no one could settle would immediately arise, namely, what length of residence should produce such consequence. It is evident that time alone cannot be the only criterion. There are many cases in which a very short residence would constitute domicile, as in the case of an emigrant, who, having wound up all his affairs in the country of his origin, departs with his wife and family to a foreign land and settles there. In a case like that, a residence for a very brief period would work a change of domicile.

" Take a contrary case, where a man, for business or pleasure, or mere love of change, is long resident abroad, occasionally returning to the country of his origin, and maintaining all his natural connections with that country: the time of residence

<sup>1</sup> (1831) 3 Hagg. Ecc. 373.

“ would not to the same extent, or in the same degree, be proof of  
“ a change of domicile.

“ We concur, therefore, in the doctrine held in many previous  
“ cases, that to constitute a change of domicile, there must be  
“ residence, and also an intention to change.

“ With respect to the evidence necessary to establish the  
“ intention, it is impossible to lay down any positive rule. Courts  
“ of justice must necessarily draw their conclusions from all the  
“ circumstances of each case; and each case must vary in its  
“ circumstances; and, moreover, in one, a fact may be of the  
“ greatest importance, but in another, the same fact may be so  
“ qualified as to be of little weight.”<sup>1</sup>

*Domicil of particular classes of persons.*—The principle laid down  
in the passages cited explains, without recourse to any special rule  
of law, the position of most of the persons supposed to have a,  
so-called, necessary domicile.<sup>2</sup>

These persons are :—

1. *Prisoners* ;
2. *Convicts* ;
3. *Exiles or refugees* ;
4. *Lunatics* ;
5. *Invalids residing abroad on account of health* ;
6. *Officials generally* ;
7. *Ambassadors* ;
8. *Consuls* ;
9. *Persons in military or naval service* ;
10. *Persons in Indian service* ;
11. *Ecclesiastics* ;
12. *Servants* ;
13. *Students*.<sup>3</sup>

<sup>1</sup> *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285, 329, 330, *per curiam*.  
Compare *Jopp v. Wood* (1865), 4 De G. J. & S. 616, 621, 622, *per Turner, L. J.*

<sup>2</sup> “ A necessary domicile ” is in strictness a domicile not determined by the purpose  
or choice of the party, but by the direct operation of some rule of law; such, for  
example, is the domicile of a wife or of a minor.

The term, however, “ necessary domicile,” is sometimes applied to the case of  
persons such as prisoners and ambassadors. This application of the term is  
erroneous. The peculiarity (if any) in the position of such persons consists in the  
fact that their residence in a particular country either cannot be, or is not, com-  
bined with the *animus manendi*, and therefore gives no ground for inferring that  
they have a domicile in such country.

<sup>3</sup> As to domicile of these persons, see Phillimore, ss. 67—72, 133—200; Wharton,

(1) *A Prisoner*.—A prisoner retains, during imprisonment, the domicile which he possessed at its commencement. He cannot form any purpose or intention as to his residence in the place where he is imprisoned.

*D*, a domiciled Irishman, was imprisoned in England. "It could not," it was laid down, "be supposed that he acquired a domicile in England by residence within the walls of the King's Bench Prison. *All such residence goes for nothing.*"<sup>1</sup>

(2) *A Convict*.—A person transported to a particular country for life absolutely loses (it is said) his original domicile. It is certainly possible that, in this instance, "the domicile of origin may be extinguished by act of law."<sup>2</sup> A sentence, further, of transportation,<sup>3</sup> *e.g.*, to Van Dieman's Land, may probably have been looked upon as an order that the convict should reside, and make his home in Van Dieman's Land, *i.e.*, be domiciled there; but there seems to be no English decision on the subject, and in the absence of any such decision doubt may be entertained whether there be any real distinction between the position of a convict, and of a prisoner. A person, at any rate, transported for years, ought, it would seem, like a prisoner, to retain the domicile which he possessed at the beginning of his imprisonment.

Supposing, however, that a sentence of transportation destroys a man's domicile of origin, it is probable that no Courts, other than those of the sovereign inflicting the sentence, would give this effect to it. French *émigrés* were treated by our Courts as retaining their domicile of origin.<sup>4</sup>

(3) *An Exile or Refugee*.<sup>5</sup>—An exile cannot dwell in his own country (*e.g.*, France), but he is not compelled to live in England.

ss. 47—54; Jacobs, ss. 264—340. Phillimore, whose treatment of the subject is ample, sometimes appears to consider that the domicile of these persons is fixed by a rule of law, whereas in general, according to English law, at any rate, their domicile (it is submitted) results simply from the application to their peculiar circumstances of the ordinary rules regulating the change and acquisition of domicile.

<sup>1</sup> *Burton v. Fisher* (1828), Milward's Reps. 183, 191, 192.

The case itself does not decide more than that *D* did not, as a fact, acquire an English domicile, but the principle contained in the words in italics is clearly sound: Phillimore, ss. 186, 187.

<sup>2</sup> *Udny v. Udny*, L. R. 1 Sc. App. 441, 458. See Phillimore, s. 191.

<sup>3</sup> See, however, as to abolition of sentences of transportation, 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

<sup>4</sup> See *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *In Goods of Duchess d'Orleans* (1859), 1 Sw. & Tr. 253.

<sup>5</sup> Phillimore, ss. 192—200; Westlake, s. 279; Wharton, s. 54; Savigny, s. 353, p. 56, note (g).

His residence, however, in England, certainly affords no presumption of an intention to adopt an English home. Mere residence, therefore, during the time of his exile, however long, does not give him an English domicile.

*D*, a French *émigré*, left France, his domicile of origin, in 1792. After a short residence in Germany, he resided in England till 1815, when he was able to return and did return to France. From 1815 to 1821, he resided generally in France. In 1821, *D* bought a house in London. In 1834, he occupied this house, and lived there till his death. *D*, it was held, never acquired an English domicile, but retained his French domicile at the time of his death.<sup>1</sup>

This case decides, not (as is sometimes supposed) that an exile *cannot* acquire a domicile in his adopted country, but only that the bare fact of his residence there does not give him a domicile. A refugee, probably, may acquire a domicile in a foreign country, if he chooses to adopt it as his home,<sup>2</sup> and, of course, may acquire a domicile in a foreign country by remaining there after his restoration to his own country has become possible.

Whether a person convicted of crime in his own country, who to escape punishment resides in another country, acquires a new domicile in such other country, may depend on the answer to the inquiry whether, under the law of his own country, lapse of time bars liability to punishment.

*D* is a French citizen with a French domicile of origin; whilst domiciled in France he is, in his absence, convicted of crime and sentenced to 10 years' imprisonment. Under French law<sup>3</sup> the lapse of 20 years is a bar to liability to punishment under such sentence. *D* on being sentenced, settles in England and lives there for 20 years; he then returns to France. *Semble*, *D* has never acquired an English domicile; the reason is that he has presumably intended to return to France at the end of 20 years.

*D* is a British subject domiciled in England; he is convicted of crime and sentenced to 5 years' penal servitude. He at once escapes to New York, lives there 4 years and dies. *Semble*, he has acquired a domicile at New York; the reason is that under English law lapse of time is no bar to liability for punishment for crime. *D* therefore presumably had no intention of ever returning to England.<sup>4</sup>

<sup>1</sup> *De Bonneval v. De Bonneval* (1838), 1 Curt. 856.

<sup>2</sup> Compare *Heath v. Sanson* (1851), 14 Beav. 441.

<sup>3</sup> *Code d'Instruction Criminelle*, art. 635.

<sup>4</sup> *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 232, judgment of Lindley, L. J.

(4) *A Lunatic*.<sup>1</sup>—There are two views as to the position of a lunatic when under control.

The first is, that he retains the domicile which he possessed at the time he became insane, or, more strictly, when he began to be legally treated as insane. This is the sound view, and is favoured by the English cases on the subject.<sup>2</sup> If this view be correct, the lunatic under confinement is in the same position as a prisoner. He cannot exercise choice, or will. He cannot, therefore, acquire a domicile. Hence he retains his existing domicile.<sup>3</sup> *D*, for example, is an Englishman, who becomes lunatic, and is under control. He is taken to Scotland, and placed in a Scotch asylum.

He remains there until his death. He retains, on this view, his English domicile. The time in the asylum counts for nothing.

The second view is, that a lunatic is a person not *sui juris*, who stands in somewhat the same relation to his committee as a child to his father, and that, therefore, his domicile can be fixed by his committee.<sup>4</sup> This view is favoured by some American cases,<sup>5</sup> but is open to objection. In the case of father and child, the infant's domicile follows that of the father, but a father cannot give his son a domicile apart from his own. In the case of a committee and a lunatic, it appears to be maintained, not that a lunatic's domicile follows that of the committee, but that it can be fixed by the committee, or, in effect, that a committee has greater power over the domicile of a lunatic than a father over that of his son. If the position of a committee be compared to that of a guardian, then it must be remarked that the power of a guardian to change a ward's domicile is itself doubtful.<sup>6</sup>

On the whole, the first view appears to be (at least under ordinary circumstances) the right one. The second arises from a confusion between the power to change a lunatic's residence and the right to change his domicile.

(5) *An Invalid*.—There is at first sight considerable difficulty in determining whether *D*, an Englishman, who resides abroad on

<sup>1</sup> Westlake (4th ed.), p. 325; Phillimore, ss. 134—139 *b*; Wharton, ss. 52, 53.

<sup>2</sup> See *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198; *Hepburn v. Skirving* (1861), 9 W. R. 764; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357.

<sup>3</sup> See Rule 4, p. 102, *ante*.

<sup>4</sup> See *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611, 617, 618, which, however, does not decide this point.

<sup>5</sup> See Wharton, s. 52.

<sup>6</sup> See Story, s. 506, note (1), and pp. 128—130, *ante*.

account of his health, loses his English domicile or not. For there exists an apparent inconsistency between the different judicial dicta on the subject.

On the one hand, it has been laid down that such a residence, being "involuntary," does not change *D*'s domicile.

"There must," it has been said, "be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the *relief from illness*."<sup>1</sup>

"A man might leave England with no intention of returning, nay, with a determination never to return, *e.g.*, a man labouring under mortal disease, and told that to preserve his life, or even to alleviate his sufferings, he must go abroad. Was it to be said that if he went to Madeira he could not do so without losing his character of an English subject—without losing the right to the intervention of the English law in the transmission of his property after his death and in the construction of his testamentary instruments? Such a proposition was revolting to common sense."<sup>2</sup>

This doctrine has been thus applied to a particular case: "If [*D*] had gone for her health to the island of Madeira, . . . and had written letters, stating that she should die there, and had given directions that she should be buried there, [then] although she had died and been buried there, unquestionably her Scotch domicile would never have been superseded."<sup>3</sup>

On the other hand, it has been maintained that if *D* chooses to reside abroad with the intention of making the foreign country his residence permanently, or for an indefinite time, the fact that the motive of the change is health does not prevent *D* from changing his domicile. In a case of this kind the law has been judicially expounded as follows:—

"That there may be cases in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of domicile, may well be admitted. Such was the case put by Lord Campbell in *Johnstone v. Beattie*, but such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate, or the hope or the opinion that the air or the habits of another

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

<sup>2</sup> *Moorhouse v. Lord* (1863), 32 L. J. Ch. 295, 299; 10 H. L. C. 272, 292, per Lord Kingsdown.

<sup>3</sup> *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 139, per Lord Campbell.



“country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other, it is decided by choice. . . . In settling [in Tuscany, *D*] was exercising a preference, and not acting upon a necessity; and I cannot venture to hold that in such a case the domicile cannot be changed. If domicile is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compulsion.”<sup>1</sup>

The apparent inconsistency between these doctrines may be removed, or explained, if we dismiss all reference to motive, to external necessity, and so forth; avoid the use of the misleading terms “voluntary” and “involuntary,” and, recurring to the principle that residence combined with the purpose of permanent or indefinite residence constitutes domicile, apply it to the different cases or circumstances under which a domiciled Englishman may take up a foreign residence for the sake of his health.

These cases are three:—

*First case.*—*D* goes to France for relief from sickness, with the fixed intention of residing there for six months and no longer.

This case presents no difficulty whatever. *D* does not acquire a French domicile any more than he does if he goes to France for six months on business or for pleasure. The reason why he does not acquire a domicile is that he has not the *animus manendi*, but the quite different intention of staying for a determinate time or definite purpose.

*Second case.*—*D*, finding that his health suffers from the English climate, goes to France and settles there, that is, he intends to reside there permanently or indefinitely. *D* in this case acquires a French domicile.<sup>2</sup>

Here, again, there is no deviation from general principle. *D*

<sup>1</sup> *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13, 28, 29; 25 L. J. Ch. 689, 695, per Turner, L. J.

<sup>2</sup> This is precisely what *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13, decides, and decides correctly. “If I were satisfied that [*D*] intended “to make England his permanent home, I do not think it would make any difference “that he had arrived at the determination to make it so by reason of the state of “his health, as to which he was very solicitous; it would be enough that for obvious “reasons he had determined to make England his permanent home.” *Wmans v. Attorney-General*, [1904] A. C. 287, 288, 289, judgment of Halsbury, C.

acquires a French domicile because he resides in France with the *animus manendi*.

*Third case.*—*D* goes to France in a dying state, in order to alleviate his sufferings, without any expectation of returning to England.

This is the case which has suggested the doctrine that a change of residence for the sake of health does not involve a change of domicile. The doctrine itself, as applied to this case, conforms to common sense. It would be absurd to say that *D*, who goes to Pau to spend there in peace the few remaining months of his life, acquires a French domicile. But the doctrine in question, as applied to this case, is in conformity not only with common sense, but with the general theory of the law of domicile. *D* does not acquire a domicile in France, because he does not go to France with the intention of permanent or indefinite residence, in the sense in which these words are applied to a person settling in another country, but goes there for the definite and determinate purpose of passing in France the few remaining months of his life. The third case, now under consideration, is in its essential features like the first, and not like the second, of the cases already examined. If *D* knew for certain that he would die precisely at the end of six months from the day when he left England, it would be apparent that the first case and the third case were identical. That the definite period for which he intends to reside is limited, not by a fixed day, or by the conclusion of a definite piece of business, but by the expected termination of his life, can make no difference in the character of the residence. In neither the first nor the third case is the residence combined with the proper *animus manendi*.

In no one of the three cases we have examined is there any necessity, in order to arrive at a right conclusion, for reference to the motive, as contrasted with, what is quite a different thing, the purpose or intention of residence.

We may now see that the contradictory dicta as to the effect of a residence for the sake of health do not of necessity imply any fundamental difference of opinion among the high authorities by whom these dicta were delivered. All these authorities might probably have arrived at the same conclusion, if they had had the same circumstances before their minds.

The Court which gave judgment in *Hoskins v. Matthews*<sup>1</sup> had to deal with the second of our supposed cases, and arrived at what,

<sup>1</sup> 25 L. J. Ch. 689 ; 8 De G. M. & G. 13.

both according to common sense and according to theory, is a perfectly sound conclusion.

The dicta on the other hand, of the authorities who lay down that a residence adopted for the sake of health does not involve a change of domicile, are obviously delivered by persons who had before their minds the third, not the second, of our supposed cases. These dicta, again, embody what, in reference to such a case, is, as we have shown, a perfectly sound conclusion. Their only defect is that they are expressed in terms which are too wide, and which therefore cover circumstances probably not within the contemplation of the authorities by whom they were delivered; and further, that, while embodying a sound conclusion, they introduce an unnecessary and misleading reference to the motives which may lead to the adoption of a foreign domicile.

(6) *Officials generally*.—Official residence in a country is not in itself evidence of an intention to settle there, because all that can (in general) be inferred from such residence is that the official resides during the time and for the purpose of his office. This is clearly so when the office is held for a limited period. There is no reason to infer from the fact of a domiciled Englishman becoming Lord-Lieutenant of Ireland, or Governor-General of India,<sup>1</sup> that he means to give up his English home or domicile. The presumption is strongly (if not conclusively) in favour of his intending to retain his English domicile.

Occasionally, however, official residence may be *prima facie* proof of a change of domicile. This is so when the office itself, from its tenure and nature, requires the official to make a home in the country where he resides. Thus, it has been suggested that if a domiciled Scotchman takes an English living, he may, on coming into residence, be assumed to have the intention of residing permanently in England, hence to acquire an English domicile.<sup>2</sup> Such a case is exceptional. As a rule, official residence is not a fact from which a change of domicile can be inferred, but much depends on the nature of the office.

(7) *An Ambassador*.<sup>3</sup>—An ambassador who represents his sovereign at a foreign court in general retains his existing domicile, which is, in most cases, the country the sovereign whereof he represents.

The reason of this is obvious. The residence of an English

<sup>1</sup> See *Attorney-General v. Pottinger* (1861), 6 H. & N. 733; 30 L. J. Ex. 284.

<sup>2</sup> See judgment of Lord Jeffrey in *Arnott v. Groom* (1846), 9 D. 142, 149—152.

<sup>3</sup> Phillimore, ss. 171—178; Story, s. 48.

ambassador in France does not raise the slightest presumption of his intention to make his home in France, and it is possible, though not certain, that the duties of an ambassador may be held absolutely incompatible with his *acquiring* a domicile in the country where he resides whilst he remains an ambassador.

An ambassador, however, if he is before his appointment already domiciled in the country where he resides as ambassador, retains his domicile in spite of his office, and this, though the domicile in the place of his residence is an acquired domicile, and the country which he represents is his domicile of origin. *D*, an Italian, acquires a domicile in England. He afterwards is appointed the representative of Italy at the English court. *D* retains his English domicile.<sup>1</sup> Though, in short, an ambassador or *attaché* does not in general acquire a domicile in the country where he resides, this is simply the result of his residence being in general unconnected with any intention to reside permanently. In a case where it was held that an *attaché* to the Portuguese Embassy retained the English domicile, which he had acquired before his appointment, the Court say, "We are not saying that if a man should have continued an *attaché* for forty or fifty years, that he would thereby, *simpliciter*, acquire an English domicile, and that his property would be subject to legacy duty. We affirm nothing of the sort. What we do affirm is, that he, having acquired an English domicile, does not lose it *ipso facto*, without more, by taking this office of an *attaché*."<sup>2</sup>

(8) *A Consul*.—A consul does not and cannot be presumed to acquire a domicile by merely living in a country as consul. On the other hand, he does not, by becoming consul, lose any domicile he already possesses. The length of his residence as consul is immaterial.<sup>3</sup>

*D*, an Englishman, resides at Leghorn for twenty years as English consul. *D* does not acquire an Italian domicile.

(9) *A Person in military or naval service*.—A soldier does not acquire a domicile in the place where he is stationed, but is domiciled in the territory of the sovereign whom he serves.

The first part of this principle results from the nature of modern military service. A soldier does not, and in fact cannot, acquire a

<sup>1</sup> *Heath v. Samson* (1851), 14 Beav. 441.

<sup>2</sup> *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391, 397, per Bramwell, B.

<sup>3</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611; *The Indian Chief* (1801), 3 C. Rob. 12, 22; *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1.

domicil in the place where he is stationed.<sup>1</sup> For *D*, an English soldier serving in Canada, cannot, during his service, however long, "settle" in Canada.

The second part of this principle is not supported by many cases, but is, it is conceived, so far well established that we may presume, unless there is evidence to the contrary, that a soldier or sailor (in the naval service) is domiciled in the country of the sovereign whom he serves, *i.e.*, that he means to have his home within the territory of that sovereign, or at least not within the territory of any other power.

Hence the following results:—

(i) *A soldier or sailor in the service of his own sovereign retains the domicil which he had on entering the service, wherever he may be stationed.*<sup>2</sup>

*D*, an Irish officer, though stationed in England, retains his Irish domicil of origin.

*D*, whose domicil of origin is English, acquires a domicil of choice in the Isle of Man. He enters the army and is stationed in Canada. He retains his Manx domicil of choice.<sup>3</sup>

(ii) *A person who enters the military or naval service of a foreign sovereign (probably) acquires a domicil in the country of such sovereign.*

*D*, a domiciled Englishman, enters the Russian army, and dies while serving in it. He, perhaps, may be presumed to have acquired a Russian domicil.<sup>4</sup> A soldier or sailor who serves a foreign sovereign certainly does not acquire a domicil at the particular place where he is stationed.

A question has further been raised, and not settled, whether a soldier who retains his rank in the service of one sovereign can,

<sup>1</sup> See judgment of Watson, B., *Re Steer* (1858), 28 L. J. Ex. 22, 25.

<sup>2</sup> This statement is approved by Lindley, L. J., *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418, at p. 425. The statement applies no less to a domicil of choice (*In re Macreight* (1885), 30 Ch. D. 165) than to a domicil of origin: See *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; 29 L. J. P. & M. 34. Compare *Attorney-General v. Napier* (1851), 6 Ex. 217; 20 L. J. Ex. 173; *Brown v. Smith* (1852), 15 Beav. 444; 21 L. J. Ch. 356, with *Craigie v. Lewin* (1843), 3 Curt. 435. See *Firebrace v. Firebrace* (1878), 4 P. D. 63, 65, 66; *Ex parte Barne* (1886), 16 Q. B. D. (C. A.) 522, and Westlake (4th ed.), pp. 342—343, ss. 273, 274.

<sup>3</sup> *In re Macreight* (1885), 30 Ch. D. 165.

<sup>4</sup> See this statement made *arguendo* in *Somerville v. Somerville* (1801), 5 Vesey, 749a, 757, and apparently admitted by the Court. Compare, also, cases such as *Craigie v. Lewin* (1843), 3 Curt. 435, as to service under the East India Company, and Westlake, pp. 337—340. There may be a difficulty in applying this doctrine in the case of states made up of several countries.

even by residence combined with the *animus manendi*, acquire a domicile in a country subject to another.

The Privy Council thus express themselves on this point:—

“We do not think it necessary for the decision of this case, that we should lay down as an absolute rule that no person being the colonel of a regiment in the service of the East India Company, and a general in the service of Her Majesty, can legally acquire a domicile in a foreign country. It is not necessary, for the decision of this case, to go so far; but we do say that there is a strong presumption of law against a person so circumstanced abandoning an English domicile and becoming the domiciled subject of a foreign power.”<sup>1</sup>

The matter becomes, in short, a question of evidence. There is the strongest presumption that *D*, who is in the service of the English Crown, does not, even though he resides in France, mean to reside there permanently, but this presumption probably might be rebutted by sufficiently strong evidence.<sup>2</sup>

(10) *A Person in the Indian service.*—The rules established with reference to the domicile of persons in the service of the East India Company were peculiar,<sup>3</sup> and are now admitted to have been anomalous.

(i) A person in the military or covenanted service of the Company acquired a domicile in India.<sup>4</sup>

(ii) The domicile thus acquired was technically termed and considered an “Anglo-Indian domicile.”<sup>5</sup>

<sup>1</sup> *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285, 319. Conf. *Bremer v. Freeman* (1857), 10 Moore, P. C. 306.

<sup>2</sup> *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284, which, however, is not decisive.

<sup>3</sup> See Phillimore, ss. 154—162; *Bruce v. Bruce* (1790), 2 B. & P. 229, n.; *Munroe v. Douglas* (1820), 5 Madd. 379; *Craigie v. Lewin* (1843), 3 Curt. 435; *Attorney-General v. Napier* (1851), 6 Ex. 217; 20 L. J. Ex. 173; *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341; *Hepburn v. Skurving* (1861), 9 W. R. 764; *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285; *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284; 6 H. & N. 733; *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730; *Attorney-General v. Fitzgerald* (1856), 25 L. J. Ch. 743; 3 Drew. 610; *Allardice v. Onslow* (1864), 33 L. J. Ch. 434; *Jopp v. Wood* (1865), 34 L. J. Ch. 212; 4 De G. J. & S. 616. The transfer of the government of India to the Crown by the Act for the better Government of India (21 & 22 Vict. c. 106), and the Indian Succession Act, 1865 (Act No. X.), have deprived these cases of most of their practical importance. Compare the Indian Succession Act, 1865, ss. 10, 11, and the Scotch case, *Wauchope v. Wauchope*, June 23, 1877, 4 Rettie, 945.

<sup>4</sup> See cases cited in foregoing note.

<sup>5</sup> As to expression “Anglo-Indian domicile,” see judgment of Cranworth, C., *Moorhouse v. Lord* (1863), 32 L. J. Ch. (H. L.) 295, 298. Compare *In re Tootal's*

Such a domicile was, for testamentary purposes (to which the cases mostly refer), equivalent to an English domicile.<sup>1</sup>

(iii) The Anglo-Indian domicile was in general retained after a person's return to Europe as long as he continued in the service of the Company and liable to be recalled to India, but such continuance was not absolutely incompatible with the acquisition or resumption of another domicile, *e.g.*, in England.<sup>2</sup>

(iv) The rules as to an Anglo-Indian domicile did not apply either to persons residing in India for the sake of business,<sup>3</sup> or to persons in the service of the Crown, and stationed in India.<sup>4</sup>

These rules worked as follows: *D*, a domiciled Scotchman, went to India as a military officer or a surgeon in the service of the Company. Whilst in India, or during a return on furlough to Scotland, he made his will, and died, say, in the year 1850. The will was made in accordance with the forms required by Scotch law, but not in accordance with the forms required by English law. The will was invalid. *D*, in virtue of his Anglo-Indian domicile, was in effect considered a person domiciled in England, and the validity of his will was determined on the principles applicable to the will of a domiciled Englishman.

The rules as to Anglo-Indian domicile were in two respects anomalous.

*First.* A soldier stationed in India in the service of the Company acquired a domicile in the country where he was stationed.<sup>5</sup>

*Secondly.* A person was held domiciled in a country where he certainly did not, in ninety-nine cases out of a hundred, intend to make his permanent home, and, therefore, where he would not in any other case have been held to be domiciled.<sup>6</sup>

The explanation of the anomaly is not far to seek. "At the time when those cases [on Anglo-Indian domicile] were decided, the government of the East India Company was, in a high degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had covenanted obligations with

*Trusts* (1883), 23 Ch. D. 532 (which shows that there cannot be an Anglo-Chinese domicile), and *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431.

<sup>1</sup> *Bruce v. Bruce* (1790), 2 B. & P. 229; *Munroe v. Douglas* (1820), 5 Madd. 379.

<sup>2</sup> *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284.

<sup>3</sup> *Jepp v. Wood* (1865), 4 De G. J. & S. 616; 34 L. J. Ch. 212.

<sup>4</sup> *Attorney-General v. Napier* (1851), 6 Ex. 217; 20 L. J. Ex. 173.

<sup>5</sup> See p. 154, *ante*.

<sup>6</sup> Conf. language of *Kindersley, V.-C.*, *Allardice v. Onslow* (1864), 33 L. J. Ch. 434, 436.

“such government for service abroad, could not reasonably be considered to have intended to retain their domicile here. *They in fact became as much estranged from this country, as if they had become the servants of a foreign government.*”<sup>1</sup>

A servant of the Company gained an Anglo-Indian domicile, not because he was stationed in India, but because he entered into the service of what may be termed an Anglo-Indian power. This explains the fact that neither merchants nor persons in the military service of the Crown were held to have acquired an Anglo-Indian domicile.<sup>2</sup>

(11) *An Ecclesiastic*.—A clergyman possessed of a cure must (it is said) be held domiciled at the place of his cure.<sup>3</sup>

The most that can be laid down is that there is a strong presumption in favour of his intention to reside there permanently. There is no reason to suppose that if the intention did not in fact exist the presumption might not be rebutted.

(12) *A Servant*.—A servant (it is sometimes laid down) has the domicile of his master.

There is not, however, any authority in English law, or anything in the circumstances of modern life, establishing a definite rule, or even a presumption, as to the domicile of a servant. Whether he has, or has not, a “permanent home” in the same country as his master must, as in other cases, depend upon the combination of fact and intention. The nature of the service may, under some circumstances, tell in favour, and in others against a presumption, that the servant adopts his employer’s domicile.<sup>4</sup>

(13) *A Student*.—There is certainly in English law nothing to justify any peculiar rule or presumption as to the domicile of a student.

As to the domicile of the foregoing classes of persons, the following points may be noticed :—

*First*. Several of the cases enumerated, such, *e.g.*, as that of an ecclesiastic, a servant, or a student, present, in fact, no peculiarity whatever. The legal home of these persons is clearly fixed in accordance with the ordinary principles of the law of domicile.

<sup>1</sup> *Jopp v. Wood* (1865), 34 L. J. Ch. 212, 219, per Turner, L. J.

<sup>2</sup> Westlake maintains a different doctrine as to the theory on which rest the rules as to an Anglo-Indian domicile. See especially, Westlake (4th ed.), pp. 338, 339, s. 265.

<sup>3</sup> Phillimore, s. 184.

<sup>4</sup> Contrast, for example, the position of a Scotchman settled as a gardener in England, with that of a Frenchman, employed as courier by an English family, travelling abroad on the Continent. See Phillimore, ss. 140–148.



*Secondly.* The other cases have most of them these features in common, that each of the persons, such as a prisoner, or an ambassador, has a residence in one place, and a domicile in another; and that the residence exists under circumstances which preclude any presumption in favour of the existence of a domicile at the place of residence; but this will be found to result not from any special rule of law fixing the domicile of the persons in question, but from the fact that the circumstances of their respective positions, either, as in the case of a prisoner, make the existence of the *animus manendi* impossible, or, as in the case of an exile, render its existence improbable. It is, of course, true that a person who is residing in a country, where for any reason he cannot or does not acquire a domicile, is, in accordance with the general rules of the law of domicile, unable to change the domicile which he possessed on coming to the country where he resides;<sup>1</sup> but his domicile is in no special sense determined by law, and cannot, therefore, be termed with any strictness of language a necessary domicile.

*Thirdly.* It is often said that the reason why, in some of the cases under consideration, and in others which might be mentioned, residence does not produce domicile is that the residence is "involuntary," or "under compulsion."

What is intended by these expressions is no doubt true, viz., that where residence cannot be, or is not, a consequence or a result of a purpose or intention to reside indefinitely (*animus manendi*), there cannot be a change of domicile; but the terms "involuntary," or "under compulsion," are so ambiguous, and so closely connected with logical and metaphysical problems, that they may lead, and have in fact led to confusion. Hence it has been laid down that "there must be a residence freely chosen, "and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness,"<sup>2</sup> whence it might be inferred that the effect of residence in producing a change of domicile depends not upon the presence or absence of the *animus manendi*, but upon the motive for the residence. This doctrine, which has already perplexed the discussion of the effect of residence abroad for the sake of health, must, unless rejected, lead to still further perplexity. It at once, for example, suggests the inquiry whether an Englishman, who resides abroad for the sake of economy, and therefore in one

<sup>1</sup> See Rules 5 to 8, pp. 103—119, *ante*.

<sup>2</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

sense against his will, acquires a foreign domicile. This question, and the like inquiries, which can never be answered by a reference to motive, are disposed of by adhering to the sound principle that residence and the *animus manendi* are the sole constituents of domicile. If these exist, the motive for the residence becomes immaterial. The only way in which consideration of a person's motive for dwelling in one place rather than in another can be important is from its effect as evidence for the existence or non-existence of the *animus manendi*. In all the cases mentioned, of residence induced, *e.g.*, by desire to escape from illness, or by the necessity for performing official duties, it is only as evidence of intention that motive is of importance. If this once be perceived, it will be found best, as already suggested, to avoid as far as possible all reference to the question whether residence be voluntary or involuntary, except in so far as a man's willingness or unwillingness to reside in a country may be proof of his intending or not intending to make it his permanent dwelling place.

*Fourthly.* When the term "involuntary," or "under compulsion," is got rid of, and the true relation between motive and residence is perceived, we see how it happens that official residence is referred to, sometimes as a reason against, and sometimes as a reason for, assuming the acquisition of domicile.

We have here to deal with a question of evidence. If the "official residence" is residence for a limited time, or for a special purpose, as in the case of a Governor-General of India, the nature of the office does away with the presumption in favour of the existence of the *animus manendi*. If, on the contrary, the office is one, such as is in modern times an ecclesiastical cure, which makes it a duty for the person holding the office to fix his home permanently in a particular place, then the nature of the office adds to the strength of the presumption that he intends to make his home in the place where, for the discharge of his official functions, he resides.

#### (B) DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

RULE 19.—The domicile of a corporation is the place considered by law to be the centre of its affairs, which

- (1) in the case of a trading corporation, is its principal place of business, *i.e.*, the place

where the administrative business of the corporation is carried on,<sup>1</sup>

(2) in the case of any other corporation, is the place where its functions are discharged.<sup>2</sup>

#### Comment.

The conception of a home or domicile, depending as it does on the combination of residence and intention to reside,<sup>3</sup> is, in its primary sense, applicable only to human beings; but by a fiction of law, an artificial domicile may be attributed to legal beings, or corporations.

The following observations as to such an artificial domicile are worth notice:—

*First.* The domicile of a corporation is entirely distinct from the domicile of the persons who compose the corporation. Thus the London and North-Western Railway Company has its domicile in England.<sup>4</sup> Its shareholders reside in England, France, Italy, &c., and have their domicils in different countries.

*Secondly.* As regards the domicile of a corporation, the distinction between residence and domicile does not in general exist.<sup>5</sup>

*Thirdly.* The domicile of a corporation must be fixed at a definite place within a given country. The Cesena Sulphur Company is domiciled in England, because its domicile is fixed at a particular place in London.

*Fourthly.* There is this essential difference between the domicile of a natural person and the domicile of a corporation. The domicile of a human being is a fact which, on certain points, subjects him to the law of a particular country. The domicile of a corporation is a fiction suggested by the fact that a corporation is, on certain points, *e.g.*, the jurisdiction of the Courts, subject to the law of a

<sup>1</sup> 2 Lindley, *Company Law* (6th ed.), App. 1, pp. 1221—1223; Savigny, s. 354; Westlake (4th ed.), pp. 358—366. See *Jones v. Scottish Accident Insurance Co.* (1856), 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

<sup>2</sup> Compare Savigny, s. 354

<sup>3</sup> See pp. 83—87, *ante*.

<sup>4</sup> See *Calcutta Jute Co. v. Nicholson* (1876), 1 Ex. D. 428, 446. Conf. *Attorney-General v. Alexander* (1874), L. R. 10 Ex. 20.

<sup>5</sup> But a foreign corporation which has the centre of its affairs in a foreign country, *e.g.*, France, may reside or be present in England so as to be liable to be served with a writ under Ord. XI. r. 8, if it does business in England through an agent. *Compagnie Générale Transatlantique v. Law*, [1899] A. C. 431; *Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft, &c.*, [1902] 1 K. B. (C. A.) 342.

particular country. A man, that is to say, is in some respects subject to the law of England because he has in fact an English domicile; a corporation is by a fiction supposed to have an English residence or domicile because it is in certain respects subject to the law of England. Hence a corporation may very well be considered domiciled, or resident, in a country for one purpose and not for another, and hence too the great uncertainty as to the facts which determine the domicile, or residence, of a corporation. In each case the particular question is not, at bottom, whether a corporation has in reality a permanent residence in a particular country, but whether, for certain purposes (*e.g.*, submission to the jurisdiction of the Courts or liability to taxation), a corporation is to be considered as resident in England, or in some other country.<sup>1</sup>

### *Trading Corporations.*

The residence and domicile of an incorporated trading company are determined by the situation of its principal place of business.

By the principal place of business is meant the place where the administrative business of the company is conducted. This may not be the place where its manufacturing or other business operations are carried on.<sup>2</sup>

Thus if a company incorporated under the Companies Acts, 1862 to 1890, for the carrying on of manufactures in India, has a registered office in England, and its affairs are conducted in England, the company is domiciled in England, not in India, and a company whose registered office is in Scotland is domiciled in Scotland,<sup>3</sup> but the registration of the company is not for all purposes of itself decisive.\* The question in each case is, where is it that the real business of the company is carried on? According

<sup>1</sup> Contrast, for example, the decisions as to the residence of a corporation under the Income Tax Act, 1853, s. 2, sched. D; *Cesena Sulphur Co. v. Nicholson* (1876), 1 Ex. D. 428; *Imperial Continental Gas Association v. Nicholson* (1877), 37 L. T. 717; *London Bank of Mexico, &c. v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378, with decisions as to the domicile or ordinary residence of a corporation under Rules of Court 1883, Ord. XI. r. 1, sub-s. (e); *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

<sup>2</sup> 2 Lindley, *Company Law* (6th ed.), App. 1, pp. 1221—1223. Conf. *Taylor v. Crowland Gas Co.* (1855), 11 Ex. 1; 23 L. J. Ex. 254; *Adams v. G. W. Rail. Co.* (1861), 6 H. & N. 404; *Corbett v. General Steam Navigation Co.* (1859), 4 H. & N. 482.

<sup>3</sup> *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

to the answer to that question, the company's domicile must, in the main, be determined.<sup>1</sup>

*Other Corporations.*

In most cases, except those of trading companies, the domicile of a corporation is fixed by its obvious connection with some special district. This applies to incorporated towns, colleges, or hospitals, obviously formed for the discharge of functions in a particular place. The same remark is applicable to such corporations sole as bishops, rectors, &c. The domicile of a bishop, as such, must (it is conceived) be found in his see, and that of a rector, in his parish.

In the case of corporations sole, there may be a distinction between the private domicile of the person, *e.g.*, the bishop, at any given moment constituting the corporation, and his corporate domicile. Thus, though it is in modern times unlikely that an English bishop should live abroad quite away from his see, with the intention of permanently residing in a foreign country, it might be held, should such a case occur, that the bishop had acquired in his private capacity a foreign domicile. In his corporate capacity, he would be in any case held to be domiciled in his diocese.

*Question.*—Can a corporation have two domicils? It may be maintained that a corporation can have two domicils. In support of this view are cited cases in which it has apparently been decided that a corporation can, for the purpose of being sued, have a domicile in each of two countries.<sup>2</sup>

Such cases are not decisive, for liability to be sued does not, in the case of a corporation, any more than of an individual, depend directly upon domicile. They may each be sued in the courts of this country, if amenable to the process of our courts. On the whole, the better opinion seems to be that a corporation has, following the analogy of an individual, one principal domicile, at the place where the centre of its affairs is to be found, and that the other places in which it may have subordinate offices correspond, as far as the analogy can be carried out at all, to the residence of an individual.

<sup>1</sup> See *Cesena Co. v. Nicholson* (1876), 1 Ex. D. 428, 437, 450, 453; *Attorney-General v. Alexander* (1874), L. R. 10 Ex. 20, 32.

<sup>2</sup> *Carron Co. v. Maclaren* (1855), 5 H. L. C. 416, 450.

## CHAPTER III.

BRITISH NATIONALITY.<sup>1</sup>

## RULE 20.

- (1) "British subject" means any person who owes permanent<sup>2</sup> allegiance to the Crown.
- (2) "Natural-born British subject" means a British subject<sup>3</sup> who has become a British subject at the moment of his birth.
- (3) "Naturalized British subject" means any British subject who is not a natural-born British subject.<sup>4</sup>

<sup>1</sup> See the Naturalization Act, 1870 (33 & 34 Vict. c. 14); the Naturalization Act, 1872 (35 & 36 Vict. c. 39); the Naturalization Act, 1895 (58 & 59 Vict. c. 43). Conf. 25 Edw. III. stat. 2; 7 Anne, c. 5, s. 3; the British Naturalization Act, 1730 (4 Geo. II. c. 21), s. 1; the British Naturalization Act, 1772 (13 Geo. III. c. 21); 7 & 8 Vict. c. 66; Westlake, chap. xv.; Foote, chap. i.; 2 Steph. Comm. (14th ed.), 433 - 439. See App., Note 9, "Acquisition, Loss, and Resumption of British nationality."

<sup>2</sup> "Permanent" allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes "temporary" allegiance to the Crown.

<sup>3</sup> Compare *Doe d. Thomas v. Acklam* (1824), 2 St. Tr. N. S. 105; *Shedden v. Patrick* (1854), 1 Macq. 535, 612, 640.

<sup>4</sup> The term "naturalized British subject," as thus defined, includes a denizen who is a person made a British subject by letters of denization granted by the Crown. "The difference between their effect and that of naturalization is that a "denizen becomes a British subject from the date of the letters but not as from "that of his birth, while a naturalized person is placed in the United Kingdom in "a position [nearly] equivalent to that of a natural-born subject [at any rate "when naturalized under the Naturalization Act, 1870] as has been seen in the "last section. This difference was important so long as aliens could not take or "hold land, for a denizen, the defect of heritable blood not being cured in him, "could not inherit land, nor could his issue born before his denization inherit it

- (4) "Alien" means any person who is not a British subject.
- (5) "Statutory alien" means any person who, having been a natural-born British subject, has become an alien in accordance with any of the following Rules.<sup>1</sup>
- The term includes a widow who, having been a natural-born British subject, has, in accordance with Rules 31 and 32, become an alien by or in consequence of her marriage with an alien.<sup>2</sup>
- (6) "Disability" means the status of being an infant, lunatic, idiot, or married woman.<sup>3</sup>
- (7) "Declaration of alienage" means a declaration of a person's desire to be an alien, made in the manner and form provided by the Naturalization Act, 1870.<sup>4</sup>

RULE 21.—Every natural person is either a British subject or an alien.<sup>5</sup>

"from him. The only practical difference now remaining appears to be that no person born out of the British dominions, though 'made a denizen, except such as are born of English parents, shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown to himself, or to any other or others in trust for him:' st. 12 & 13 Will. III. c. 2, s. 3." Westlake (4th ed.), p. 352. Compare, however, Cockburn, *Nationality*, p. 28.

<sup>1</sup> See Rules 26—29, 31, 35, *post*, and compare Naturalization Act, 1870, ss. 8, 3, 4, and 10.

<sup>2</sup> *Ibid.* s. 10, sub-ss. (1) and (2). The term "statutory alien" applies only to a person who has originally been a natural-born British subject. The term, further, does not, it would appear (if the Naturalization Act, 1870, be construed strictly), include a divorced woman who, having been a natural-born British subject, has become an alien by or in consequence of a marriage with an alien, which has been dissolved by divorce. See Rule 33, *post*, and compare the Naturalization Act, 1870, s. 10, sub-s. (2); Von Roemer's Resumption, &c. Act, 1894.

<sup>3</sup> *Ibid.*, s. 17.

<sup>4</sup> *Ibid.*, ss. 3, 11.

<sup>5</sup> Whether a person is in fact a British subject may be, *e.g.*, on a question of extradition, decided by a jury on the facts of the case in accordance with the law determining the acquisition of British nationality. *Guerin v. The Bank of France* (1888), 5 Times L. R. 160.

## Comment.

This follows from the definition given of the terms "British subject" and "alien."<sup>1</sup>

More than one state may claim the allegiance of the same individual, and a man whom English Courts treat as a British subject may, by French Courts, be treated as a French citizen.

An alien, further, who has, under the Naturalization Act, 1870, acquired a certificate of naturalization "shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect."<sup>2</sup> Hence a person naturalized under the Naturalization Act, 1870, may under some circumstances be held, even by English Courts, to be an alien.

(A) ACQUISITION OF BRITISH NATIONALITY AT BIRTH  
(NATURAL-BORN BRITISH SUBJECTS).

RULE 22.<sup>3</sup>—Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions, is a natural-born British subject.

## Comment.

This Rule contains the leading principle of English law on the subject of British nationality.

"Allegiance is the tie, or *ligamen*, which binds the subject to the King, in return for that protection which the King affords the subject."<sup>4</sup> But every person born within the British dominions

<sup>1</sup> See pp. 164, 165, *ante*.

<sup>2</sup> Naturalization Act, 1870, s. 7. See Rule 25, *post*.

<sup>3</sup> "All persons born within the limits of the British Empire fall within [the] description [of natural-born British subjects]; and this rule extends even to those born of aliens residing in the dominions of the Crown, provided their parents were not at the time in enmity with our monarch." 2 Steph. Comm. (14th ed.), pp. 437, 438. See Cockburn, *Nationality*, p. 7, and *Calvin's Case* (1608), 7 Rep. 18 a. Compare *Re Stepney Election Petition*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54, which is quite consistent with Rule 22.

<sup>4</sup> 1 Blackstone, 366. "Therefore it is truly said that *protectio trahit subjectionem*, et *et subiectio protectionem*." *Calvin's Case* (1608), 7 Rep. 5 a. This principle is



does, with very rare exceptions, enjoy at birth the protection of the Crown. Hence, subject to such exceptions, every child born within the British dominions is born "within the ligeance," as the expression goes, of the Crown, and is at and from the moment of his birth a British subject; he is, in other words, a natural-born British subject.

Nationality under this Rule is independent of descent. The child of aliens, if born within any country subject to the Crown, is a natural-born British subject. At common law he could not change his nationality. As things now stand, however, his position is marked by this peculiarity: he can,<sup>1</sup> in general, after he has come of age, renounce British nationality.<sup>2</sup>

### Illustrations.

1. *S*,<sup>3</sup> the child of French citizens, is born in London, when his parents are there on a visit. *S* is a natural-born British subject.

2. *S*, the child of French citizens, is born at Calcutta. *S* is a natural-born British subject.

3. *S*, the child of French citizens, is born on board a British ship when the ship is on the high seas. *S* is a natural-born British subject.

4. In 1812 *S*, the child of a French prisoner of war, is born in England. *S* is a natural-born British subject.

*Exception 1.*—Any person who (his father being an alien enemy) is born in a part of the British dominions which at the time of such person's birth is in hostile occupation, is an alien.<sup>4</sup>

followed in the United States. See *United States v. Wong Kim Ark* (1897), 169 U. S. Rep. 649, 652, judgment of Court. A child born in the United States of parents of Chinese descent and Chinese subjects is, under the Fourteenth Amendment, a citizen of the United States from the time of his birth. *Ibid.* It is well to notice that allegiance, though it practically depends upon the place of a person's birth, theoretically depends on a person's being born under the control and within the protection of a particular sovereign, and therefore only indirectly on the place of a person's birth. This consideration explains most of the exceptions to the rule that a person born within British territory is a British subject. See as to resident alien, *De Jager v. Att.-Gen. of Natal*, [1907] A. C. 326.

<sup>1</sup> See Naturalization Act, 1870, s. 4.

<sup>2</sup> See Rule 28, *post*, and App. Note 9, "Acquisition, Loss, and Resumption of British Nationality."

<sup>3</sup> "*S*" (Subject) throughout this chapter stands for the person whose nationality is in question.

<sup>4</sup> "British nationality results from birth in the British dominions, except in the

## Comment.

“ If enemies should come into any of the King’s dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King’s ligeance or obedience.”<sup>1</sup>

## Illustration.

A French army, during a war with England, occupy Jersey. *S*, the child of a French soldier, is born in Jersey during the hostile occupation. *S* is an alien.

*Exception 2.*—Any person whose father (being an alien) is at the time of such person’s birth an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state is (though born within the British dominions) an alien.<sup>2</sup>

## Illustrations.

1. *S* is born in London. He is the child of a Frenchman accredited to the Crown as ambassador of the French Republic. *S* is an alien.

2. *S* is born in London. *S* is the child of a Russian ambassador accredited by the Czar to the French Republic, but staying in England at the time of *S*’s birth. *S* (*semble*) is a natural-born British subject.

RULE 23.<sup>3</sup>—Subject to the exception hereinafter mentioned, any person

(1) whose father is born within the British dominions, or

“ case of a child born to an enemy father at a place in a hostile occupation.” Westlake (4th ed.), pp. 348, 349; *Calvin’s Case* (1608), 7 Rep. 18 *a*.

<sup>1</sup> *Calvin’s Case* (1608), 7 Rep. 18 *a*, 18 *b*.

<sup>2</sup> See Cockburn, *Nationality*, p. 7.

<sup>3</sup> This Rule gives the effect of 7 Anne, c. 5, s. 3; 4 Geo. II. c. 21, s. 1; 13 Geo. III. c. 21. See Westlake (4th ed.), pp. 349—351, ss. 282, 283; 2 Steph. Comm. (14th ed.), pp. 438, 439; *De Geer v. Stone* (1882), 22 Ch. D. 243; *In re Willoughby* (1885), 30 Ch. D. (C. A.) 324.

(2) whose paternal grandfather is born within the British dominions,  
is (though not born within the British dominions) a natural-born British subject.

Provided that no person is under this Rule a natural-born British subject whose father is not at the time of such person's birth a natural-born British subject.<sup>1</sup>

### Comment and Illustrations.

The principle of the common law is that a person born beyond the limits of the British dominions does not at his birth owe allegiance to the Crown, and cannot, therefore, be a natural-born British subject. If such a person acquires British nationality at all, he must acquire it at some later period of his life. This principle, however, was before 1870 so far relaxed by legislation that "persons born abroad whose *fathers* (or *grandfathers* by the "father's side) were natural-born subjects are deemed to be "natural-born subjects themselves, to all intents and purposes."<sup>2</sup>

1. *A* is born in England. *S*, his son, is born at Naples. *S* is a natural-born British subject.

2. *A* is born in England. *B*, his son, is born at Naples. *S*, the son of *B* and grandson of *A* (*S*'s paternal grandfather), is also born at Naples. *S* is a natural-born British subject.

The proviso is necessitated by the fact that a natural-born British subject may now legally become an alien.<sup>3</sup> In this case

<sup>1</sup> Compare *Doe d. Thomas v. Acklam* (1824), 2 St. Tr. N. S. 105; and the Naturalization Act, 1870, s. 10, sub-s. (3) (Rule 35, p. 185, *post*), with *Fitch v. Weber* (1847), 6 Hare, 51. The last case seems inconsistent with the proviso, but in 1847 a British subject, though he could get himself naturalized in a foreign country by the laws thereof, could not thereby, in the eye of English law, throw off his allegiance to the Crown and cease to be a British subject. A man therefore could, except under treaty, never in strictness cease to be a natural-born British subject. Now, however, a British subject, whether a natural-born or a naturalized British subject, can, by taking the proper steps, become an alien. When a person who is a natural-born British subject thus becomes an alien and ceases to be a British subject at all, he ceases to belong to the class of natural-born British subjects.

<sup>2</sup> 2 Steph. Comm. (14th ed.), pp. 438, 439.

This sums up the effect of 7 Anne, c. 5, s. 3; 4 Geo. II. c. 21, s. 1; 13 Geo. III. c. 21, as interpreted by *De Geer v. Stone* (1882), 22 Ch. D. 243; *In re Willoughby* (1865), 30 Ch. D. (C. A.) 324.

<sup>3</sup> See Rules 26—29, pp. 176—178; 31—33, pp. 180, 181; and 35, p. 185, *post*.

he ceases to be a British subject, and, therefore, is no longer a natural-born British subject for the purpose of transmitting British nationality.

“ We think the sense of these words [*i.e.*, ‘natural-born British ‘subject,’ in the statute 4 Geo. II. c. 21] is very plain. “ Natural-born subjects are mentioned as distinguished from “ subjects by donation or any other mode. A child born out of “ the allegiance of the Crown of England is not entitled to be “ deemed a natural-born subject, unless the father be, at the “ time of the birth of the child, not a subject only, but a subject “ by birth. The two characters of subject and subject by birth “ must unite in the father.”<sup>1</sup>

In order, in short, that a child born abroad may, under Rule 23, be a natural-born British subject, his father must at the moment of the child’s birth combine two characteristics: viz., first, the characteristic of having been a British subject at the time of his own (the father’s) birth, and, secondly, of still retaining the character of a natural-born British subject at the moment of the child’s birth. If either of these characteristics is wanting, the child is not a natural-born British subject.

1. *A* is born in England.<sup>2</sup> *A* expatriates himself, and becomes an alien.<sup>3</sup> *S*, the son of *A*, is born in Italy, after *A* has become an alien. *S* is not a natural-born British subject.<sup>4</sup>

2. *A* is born in England. *A* becomes an alien.<sup>5</sup> After *A* has become an alien, *B*, the son of *A* and father of *S*, is born in Italy. *S*, the son of *B* (and grandson of *A*), is born in Italy. *S* is not a natural-born British subject.

3. *A* is born in England. He becomes a statutory alien,<sup>6</sup> and afterwards is, in accordance with Rule 30, re-admitted to British nationality. After *A* has resumed his British nationality, *S*, his son, is born in Italy. *Seemingly*, *S* is a natural-born British subject.<sup>7</sup>

4. *A* is born in England. He becomes an alien. After *A* has become an alien, *B*, his son, is born in Italy. *B* becomes a

<sup>1</sup> *Doe v. Thomas v. Acklam* (1824), 2 St. Tr. N. S. 105, 120, *per curiam*.

<sup>2</sup> See Rule 22, p. 166, *ante*.

<sup>3</sup> See Rules 26–29, pp. 176–178, *post*.

<sup>4</sup> Compare, especially, *Doe v. Thomas v. Acklam* (1824), 2 St. Tr. N. S. 105.

<sup>5</sup> See Rules 26–29, *post*.

<sup>6</sup> See Rules 26–29, *post*, and Naturalization Act, 1870, ss. 6, 4, 8.

<sup>7</sup> Whether *S* is or is not a natural-born British subject depends upon the proper interpretation of the Naturalization Act, 1870, s. 8, which is reproduced in Rule 30, p. 178, *post*.

naturalized British subject by obtaining a certificate of naturalization in accordance with Rule 25.<sup>1</sup> After *B* has become a naturalized British subject, *S*, the son of *B*, is born in Italy. *S* is not a natural-born British subject.<sup>2</sup>

*Exception.*<sup>3</sup>—Any person born out of the British dominions, whose father, though a natural-born British subject, is, at the time of such person's birth, in the actual service of any foreign prince or state in enmity with the Crown, is not a natural-born British subject.

#### Illustration.

*A* is an Englishman born in England. During a war between England and Russia, *A* enters into or remains in the service of the Czar. *S*, the son of *A*, is born at St. Petersburg whilst *A* is in the Russian service. *S* is not a natural-born British subject.

RULE 24.<sup>4</sup>—Any person whose father (being a British subject) is, at the time of such person's birth, an ambassador or other public minister in the service of the Crown, is (though born out of the British dominions) a natural-born British subject.

#### Comment.

The principle that the child of a British ambassador is, though not born within the British dominions, a natural-born British subject, holds good (it is submitted) only where the ambassador is a British subject. The sole practical importance, therefore, of

<sup>1</sup> *I.e.*, in accordance with Naturalization Act, 1870, s. 7.

<sup>2</sup> See comment on Rule 34, p. 182, *post*. At the time of *S*'s birth *B*, his father, is a British subject, but he is not a natural-born British subject.

<sup>3</sup> This Exception gives the effect of 4 Geo. II. c. 21, s. 2. The same statute contains two other exceptions under which children whose fathers are attainted of high treason by judgment of outlawry or otherwise in the United Kingdom, or whose fathers have rendered themselves liable to the penalties of high treason or felony by returning to the United Kingdom without the licence of the Crown, are, if born out of the British dominions, not natural-born British subjects. But these exceptions are (it is conceived) of practical importance (if at all) only as regards the past. The first of them certainly, and the second of them probably, can hardly arise since the passing of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), and 20 & 21 Vict. c. 3.

<sup>4</sup> Westlake, s. 281, p. 349. Conf. *Calvin's Case* (1608), 7 Rep. 18 a.

Rule 24 is that under it a child born abroad may occasionally be a natural-born British subject, where, from the father being a naturalized British subject, or from some other cause, the child is not a natural-born British subject under Rule 23.<sup>1</sup>

SUB-RULE.—British nationality is not inherited through women.<sup>2</sup>

Illustration.

S is the illegitimate son of an unmarried Englishwoman. He is born in Paris. He is not a British subject.

(B) ACQUISITION, LOSS, AND RESUMPTION OF BRITISH NATIONALITY AT PERIOD OF LIFE LATER THAN BIRTH.

I. ACQUISITION, LOSS, &C., BY PERSON NOT BEING UNDER ANY DISABILITY.

(i) *Acquisition.*

RULE 25.<sup>3</sup>—An alien [not being under any disability?] who within such limited time before making the application hereinafter mentioned as may be allowed by one of His Majesty's Principal Secretaries of State [hereinafter referred to as the Secretary of State], either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to the Secretary of State for a certificate of naturalization.

<sup>1</sup> See p. 168, *ante*.

<sup>2</sup> See *Doe v. Jones* (1791), 4 T. R. 300; Cockburn, *Nationality*, p. 11.

<sup>3</sup> Naturalization Act, 1870, s. 7. The last two paragraphs of sect. 7 are omitted from this Rule. They enable the Secretary of State to grant a certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and to grant a certificate of naturalization under the Naturalization Act, 1870, to an alien who has been naturalized previously to the passing of that Act.

The applicant must adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The Secretary of State, if satisfied with the evidence adduced, must take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good; and no appeal lies from his decision, but such certificate does not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalization is granted is in the United Kingdom entitled to all political and other rights, powers, and privileges, and is subject to all obligations, to which a natural-born British subject is entitled, or subject in the United Kingdom, with this qualification, that he is not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, to be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

#### Comment and Illustrations.

This Rule follows in substance, though with one material addition, the terms of the Naturalization Act, 1870, s. 7.

The material addition is the insertion of the words in brackets, "not being under any disability." In this Rule it is, in short, assumed that the Naturalization Act, 1870, s. 7, does not apply to a married woman, an infant, a lunatic, or an idiot.<sup>1</sup> The soundness of this assumption is probable, but not certain. It is hardly, indeed, to be supposed that a certificate of naturalization can be granted to a lunatic or idiot, or, in the face of the Naturalization Act, 1870, s. 10, sub-s. (1),<sup>2</sup> to a married woman. The only uncertain point is whether, under the Naturalization Act, s. 7, a valid certificate of naturalization may not be applied for, by an

<sup>1</sup> See definition of "disability," p. 165, *ante*.

<sup>2</sup> This is reproduced in Rule 31, p. 180, *post*.

infant, who has otherwise complied with the conditions laid down in that section and reproduced in this Rule.<sup>1</sup>

The matters which require consideration are the conditions of application for a certificate of naturalization; the authority of the Secretary of State as to granting a certificate; the effect of a duly obtained certificate; and, lastly, the effect of an unduly obtained certificate.

*Conditions.*—The right of an alien to apply for a certificate of naturalization is subject to the following conditions:—

The alien must, within the time<sup>2</sup> allowed by the Secretary of State, have for *five* years *either* resided in the United Kingdom, *or* been in the service of the Crown.

The alien must also intend when naturalized *either* to reside in the United Kingdom, *or* to serve under the Crown.

1. *S* is a French citizen who has resided in London for the last six years, and intends when naturalized to reside in some part of Great Britain or Ireland, or else to serve the Crown, *e.g.*, as a consul in a foreign country. *S* may apply for a certificate of naturalization.

2. *S* is a French citizen. He has been in the service of the Crown as British consul at Boulogne for the last six years. He intends when naturalized to continue his service as consul. *S* may apply for a certificate.

3. *S* is a French citizen, of the age of 22. He has resided in London since he was 16. He intends when naturalized to reside in London. *S* may apply for a certificate.

4. *S* is a French citizen who has resided in Jersey for ten years, and in London for the last two years. He intends when naturalized to reside in London as a clerk in the Foreign Office. He has no right<sup>3</sup> to apply for a certificate.

5. *S* is a French citizen who has resided for the last ten years in London; he intends to settle as a merchant in Jersey. *S* has no right to apply for a certificate. But *S* (*semble*) would have a right to apply if he intended to *réside*, after obtaining it, for

<sup>1</sup> It is understood that no objection will now be taken by the Secretary of State to the grant of a certificate of naturalization on the ground of the infancy of the applicant, provided the infant's object in applying is to qualify for admission to the army or navy.

<sup>2</sup> This time is generally eight years, but note that the Secretary of State may on any special occasion allow any other period of time during which the required residence or service may have taken place.

<sup>3</sup> See definition of "United Kingdom," p. 68, *ante*.



a certain time (*e.g.*, a year) in the United Kingdom, and then to reside as a merchant in Jersey.

*Authority of Secretary of State.* The Secretary of State, being satisfied with the evidence produced by the applicant of his residence or service, may in his discretion grant or withhold a certificate. *The discretion of the Secretary of State is absolute; no appeal lies from his decision.*<sup>1</sup>

*S* is a French citizen. He has been in the service of the Crown as British consul at Boulogne for the last six years. He intends when naturalized to continue his service as consul. He applies for a certificate of naturalization, and gives evidence satisfying the Secretary of State of the above facts. The Secretary of State, without assigning any reason, withholds a certificate. *S* has no appeal from the Secretary's decision.

*Duly obtained certificate.* The certificate of naturalization, when granted, produces no effect until the applicant has taken the oath of allegiance. When the applicant has taken the oath of allegiance he becomes *in the United Kingdom* entitled to all the rights and subject to all the obligations of a natural-born British subject.

As to these rights, &c. three points are to be noted:—

*First.* They are rights “within the United Kingdom.” *S*, who has obtained a grant, need not necessarily have all the rights, &c. of a British subject in parts of the British dominions outside the United Kingdom.

*Secondly.* The grant of British nationality is subject to the qualification that *S*, who has obtained it, is not to be considered a British subject in the country, *e.g.*, France, to which he previously belonged, unless he has ceased to be a French citizen by the laws of France.

*Thirdly.* *S* is, in regard to the right of transmitting British nationality to his children, in the position of a “*naturalized*,” not of a “*natural-born*,” British subject.<sup>2</sup>

*Unduly obtained certificate.* An applicant for a certificate of naturalization may conceivably satisfy the Secretary of State that he has fulfilled a condition necessary for its attainment, *e.g.*, five years' residence in the United Kingdom, without having in reality fulfilled it. Suppose that an alien, who has thus irregularly obtained a certificate, thereupon takes the oath of allegiance; is

<sup>1</sup> But there is nothing in the Act to prevent reiterated applications for a certificate.

<sup>2</sup> Compare Rules 22, 23, pp. 166, 168, *ante*, and Rule 34, p. 182, *post*, with comment thereon, *post*.

such a person a naturalized British subject? The answer must (apparently) be in the affirmative. The fraud by which the certificate has been obtained does not affect its validity. The Secretary's decision is conclusive, and the law provides no means of annulling or revoking the certificate.<sup>1</sup>

(ii) *Renunciation.*

RULE 26.<sup>2</sup>—Any British subject who has at any time before, or may at any time after, the 12th day of May, 1870,<sup>3</sup> when in any foreign state and not under any disability, voluntarily become naturalized in such state, is, from and after the time of his so having become naturalized in such foreign state, to be deemed to have ceased to be a British subject and to be regarded as an alien.

**Comment.**

Under this Rule, any British subject, whether he be a natural-born British subject or a naturalized British subject, can, if he is under no disability, and if he is in a foreign state, by the simple process of being naturalized in such state, cease to be a British subject and become an alien. The Rule applies only to a person who is in a foreign state. It does not apply to a person in the British dominions.

This Rule—and the same remark applies to every other Rule allowing the renunciation or loss of British nationality—embodies a principle unknown to the common law, which was introduced into English law by the Naturalization Act, 1870.

**Illustrations.**

1. S is an Englishman born in England. He goes to New York, and is naturalized as an American citizen. S ceases to be a British subject and becomes an alien.

<sup>1</sup> If, indeed, a married woman should, by representing herself as a widow or a *feme sole*, obtain a certificate of naturalization, the certificate would, it is submitted, be a nullity, for to hold it valid would be a direct contravention of the Naturalization Act, 1870, s. 10, sub-s. 1. See Rule 31, p. 180, *post*.

<sup>2</sup> Naturalization Act, 1870, s. 6, 1st paragraph. Two provisos are omitted which have reference to resumption of British nationality within two years after the passing of the Naturalization Act, 1870, by a British subject who, though he has voluntarily become naturalized in a foreign state, desires to remain a British subject. Note retrospective effect of Rule 6, and see sect. 15.

<sup>3</sup> *I.e.*, date of passing of the Naturalization Act, 1870.

2. *S* is a natural-born British subject residing in England. He is made a French citizen under a law passed by the French National Assembly. He does not cease to be a British subject.

RULE 27.<sup>1</sup>—Where the Crown has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it may be declared, by Order in Council, that such convention has been entered into by the Crown; and, from and after the date of such Order in Council, any person [not being under any disability (?) and]<sup>2</sup> being originally a subject or citizen of the state referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person is to be regarded as an alien, and as a subject of the state to which he originally belonged as aforesaid.

#### Comment.

This Rule is practically unimportant. The only conventions which have as yet been made under it are the conventions of the 13th May, 1870, and of the 23rd February, 1871, respectively, between the Crown and the United States of America.

RULE 28.<sup>3</sup>—Any person who by reason of his having been born within the British dominions<sup>4</sup> is a natural-

<sup>1</sup> See Naturalization Act, 1870, s. 3, 1st paragraph, which is followed with slight verbal alterations.

<sup>2</sup> Nothing is said in the Naturalization Act, 1870, s. 3, as to the person who makes a declaration of alienage not being under any disability. But the section is (it is submitted) certainly not meant to apply either to a married woman, an infant, a lunatic, or an idiot. The words added in brackets are intended to give the effect of the section.

<sup>3</sup> Naturalization Act, 1870, s. 4 (part).

<sup>4</sup> See definition of "British dominions," p. 68, *ante*. The actual words of s. 4 are "dominions of Her Majesty."

The reference in s. 4 to full age is omitted, this being covered by words "not under any disability."

born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if not under any disability, make a declaration of alienage, and from and after the making of such declaration of alienage such person ceases to be a British subject, *i.e.*, becomes an alien.

#### Illustration.

*S* is the son of Italian parents. He is born in London. He is thus a natural-born British subject.<sup>1</sup> He is also, under the law of Italy, an Italian subject. When he comes of age, *S* makes a declaration of alienage. He thereby ceases to be a British subject, *i.e.*, becomes an alien.

RULE 29.<sup>2</sup>—Any person who is born out of the British dominions, of a father being a British subject, may, if not under any disability, make a declaration of alienage, and from and after the making of such declaration ceases to be a British subject, *i.e.*, becomes an alien.

#### Illustration.

*S* is born at Naples. *A*, his father, is an Englishman born in England. *S*, who is thus a natural-born British subject,<sup>3</sup> on coming of age makes a declaration of alienage. He thereby ceases to be a British subject, *i.e.*, becomes an alien.

#### (iii) Resumption.

RULE 30.<sup>4</sup>—Any statutory alien [not being under any disability?] may, on performing the same conditions and adducing the same evidence as is required under

<sup>1</sup> See Rule 22, p. 166, *ante*.

<sup>2</sup> Naturalization Act, 1870, s. 4 (part). The reference to full age is omitted as unnecessary.

<sup>3</sup> See Rule 23, p. 168, *ante*.

<sup>4</sup> The Naturalization Act, 1870, s. 8, slightly curtailed. See also s. 10, sub-s. (2), and compare definition of "statutory alien," Rule 20, p. 164, *ante*. The importance of this is that the term "statutory alien" applies only to a person who has been a "natural-born" British subject.

Rule 25 in the case of an alien applying for a certificate of naturalization,<sup>1</sup> apply to the Secretary of State for a certificate (hereinafter referred to as a certificate of re-admission to British nationality) re-admitting him to the status of a British subject. The Secretary of State has the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance is in like manner required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted, from the date of the certificate of re-admission, but not in respect of any previous transaction, resumes his position as a British subject; with this qualification, that, within the limits of the foreign state of which he became a subject, he is not to be deemed to be a British subject unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect.

The jurisdiction exercisable under this Rule by the Secretary of State in the United Kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession is, in the case of such person, to be deemed equivalent to residence in the United Kingdom.

#### Comment.

Under this Rule any natural-born British subject who has become a statutory alien<sup>2</sup> can, subject to the limitations laid down

<sup>1</sup> The expression in the Naturalization Act, 1870, s. 8, is certificate of "nationality." But what is clearly meant is a certificate of naturalization.

<sup>2</sup> See definition of "statutory alien," Rule 20, p. 165, *ante*, and note that it includes a widow who, having been a natural-born British subject, has become an alien in consequence of her marriage with an alien. See Rules 31, 32, *post*. She may, therefore, during widowhood obtain a certificate of re-admission to British nationality under Rule 30. Conf. the Naturalization Act, 1870, s. 8, and s. 10 (2).

in the Rule, "resume" his position, not only as a "British subject," but also as a *natural-born* British subject. If this were not so, the Rule<sup>1</sup> would be superfluous, since a statutory alien might, like any other alien, become a *naturalized* British subject under Rule 25.<sup>2</sup>

There is no special rule as to the resumption of British nationality by a naturalized alien who has lost or renounced British nationality. He stands apparently in the same position as an alien who has never been a British subject.

In this Rule the term "British possession" means in any colony, plantation, island, or settlement within the British dominions, but not within the United Kingdom; and the word "governor" includes any person exercising the chief authority in a British possession.<sup>3</sup>

#### Illustrations.

1. *S* is a natural-born British subject. He becomes a French citizen, and thereby ceases to be a British subject.<sup>4</sup> He has resided for the last six years either in Jamaica or in London. He may apply for a certificate of re-admission to British nationality.

2. *S* is an Englishwoman born in England. She marries a French citizen, and thereby becomes a statutory alien.<sup>5</sup> After the death of her husband she returns to England, and resides there unmarried for five years. She may apply for a certificate of re-admission to British nationality.

## II. ACQUISITION, LOSS, &C., BY PERSON BEING UNDER DISABILITY.

### (i) *Married Woman.*

RULE 31.<sup>6</sup>—A married woman is to be deemed to be a subject of the state of which her husband is for the time being a subject.

<sup>1</sup> *I.e.*, the Naturalization Act, 1870, s. 8.

<sup>2</sup> See p. 172, *ante*, and the Naturalization Act, 1870, s. 7. The conclusion, in short, that a statutory alien, on obtaining a certificate of re-admission to British nationality, "resumes his position" as a *natural-born* British subject results from a comparison of sects. 7 and 8 of the Naturalization Act, 1870.

<sup>3</sup> Conf. Naturalization Act, 1870, ss. 8, 17.

<sup>4</sup> See Rule 26, p. 176, *ante*.

<sup>5</sup> See Rule 31.

<sup>6</sup> Naturalization Act, 1870, s. 10 (i). Contrast for the common law rule which subsisted till 7 & 8 Vict. c. 66 (1844), Cockburn, *Nationality*, pp. 11, 12.

### Comment.

This Rule embodies a complete change in the law of England. By the common law marriage does not affect a woman's nationality. Now, in virtue of the Naturalization Act, 1870, s. 10, her nationality varies under English law with that of her husband.

### Illustrations.

1. *S* is a Frenchwoman born in France. She marries a British subject. She becomes a British subject.

2. *S* is an Englishwoman born in England. She marries a French citizen domiciled in London. She thereupon is deemed to be a French citizen, and becomes a statutory alien.<sup>1</sup>

RULE 32.<sup>2</sup>—A widow continues to be the subject of the state of which her late husband was at his death a subject, until she changes her nationality.

### Comment and Illustration.

This Rule is not, in so many words, laid down in the Naturalization Act, 1870; it may, however, be reasonably deduced from the Naturalization Act, 1870, s. 10, sub-ss. (1) and (2).

*S* is a natural-born British subject. She marries a French citizen living and domiciled in England. She never leaves England till his death. On the death of her husband she remains a French citizen.

RULE 33.<sup>3</sup>—A divorced woman continues to be the subject of the state of which her husband was a subject immediately before or at the moment of divorce, until she changes her nationality (?).

<sup>1</sup> Under French law, a foreign woman who marries a Frenchman follows the status of her husband. *S.*, therefore, in fact becomes on her marriage a French citizen. *Seemle*, however, she would under the Naturalization Act, 1870, be "deemed to be" a French citizen in England even if she were not so in fact under French law.

<sup>2</sup> Compare Naturalization Act, 1870, s. 10, sub-ss. (1) and (2). See *Bloxam v. Favre* (1883), 8 P. D. 101; (1884), 9 P. D. (C. A.) 130.

<sup>3</sup> Compare Rules 31, 32, *ante*.

**Comment.**

This Rule is conjectural. It does not rest on any direct statutory authority; it is merely an inference from the Naturalization Act, 1870, s. 10, sub-ss. (1) and (2).

**Illustrations.**

1. *S* is an Englishwoman born in England. She marries a French citizen domiciled in London. They are divorced by the High Court. *S* (*semble*) remains a French subject.

2. *S* is a Frenchwoman born in France. She marries a British subject residing and domiciled in France. After ten years' continuous residence in France they are there divorced. *S* (*semble*) remains a British subject.

*(ii) Infant.*

RULE 34.<sup>1</sup>—Where a father, or a mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother, who during infancy has become resident with such father or mother in any part of the United Kingdom, or with such father while in the service of the Crown out of the United Kingdom,<sup>2</sup> is to be deemed to be a naturalized British subject.

[This Rule applies (*semble*) to children born out of the British dominions as well after as before the parent's naturalization.]<sup>3</sup>

**Comment.**

The naturalization of an alien does not of itself, and independently of statute, affect the nationality of his children, and this whether they are born before or after his own naturalization. If they are born within the British dominions they are natural-born British subjects, without any reference to their father's nationality.<sup>4</sup> If they are born outside the British dominions

<sup>1</sup> Naturalization Act, 1870, s. 10, sub-s. (5).

<sup>2</sup> See the Naturalization Act, 1895 (58 & 59 Vict. c. 43), ss. 1, 2.

<sup>3</sup> These words are not in the Naturalization Act, 1870, but are added to give what is conceived to be the effect of sect. 10, sub-s. (5).

<sup>4</sup> See Rule 22, p. 166, *ante*.



before his naturalization, they are clearly at common law aliens, and, if they are so born after his naturalization, they are also apparently aliens.<sup>1</sup>

The Naturalization Act, 1870, s. 10, sub-s. (5), which Rule 34 reproduces, fixes the conditions under which the children of a naturalized British subject<sup>2</sup> may themselves become British subjects. This enactment, as is assumed in the Rule, applies to children born as well before as after the parent's naturalization.

*Conditions.* — The conditions under which the child of a naturalized British subject becomes himself a naturalized British subject are two :—

*First.* The child must *during infancy* become resident in some part of the United Kingdom, or in some country out of the United Kingdom where the *father* is acting in the service of the Crown.

The expression “during infancy” is ambiguous.

It cannot, from the nature of things, mean the whole period of infancy, but it may mean either the whole or a part of the remainder of the child's infancy. If it means a part, what part or proportion of the child's infancy is meant? The answer (it is submitted) must be that the period intended is indefinite, and that the words “during infancy” mean such part of the child's infancy as is sufficient to constitute residence. Still the words, taken as they are from an Act of Parliament, are deplorably vague. The difficulty of construing them is increased by the consideration that “infancy” is not a term of Scotch law, though Scotland is part of the United Kingdom.

*Second.* The residence must be *residence with* the parent who has obtained a certificate of naturalization.

What circumstances amount to residence of a child with a parent must in each case be a question of fact.

<sup>1</sup> This, it is submitted, is the effect of 7 Anne, c. 5, s. 3; 4 Geo. II. c. 21, s. 1; 13 Geo. III. c. 21, taken together with the Naturalization Act, 1870, s. 10. Compare *De Geer v. Stone* (1882), 22 Ch. D. 243. The position, however, as to nationality of the children of a naturalized alien, who after his naturalization are born out of the British dominions, is far from clear. The point is referred to but not decided by *In re Bourgoise* (1889), 41 Ch. D. (C. A.) 310. See, especially, judgment of Cotton, L. J., p. 320, and of Lindley, L. J., p. 321, and 5 Law Q. Rev. 438. Westlake, however, contends (p. 357) that: “The person so naturalized [*i.e.*, under “the Naturalization Act, 1870, s. 7] is capable of transmitting the British character “to his children and grandchildren born abroad.” With this statement I am unable to agree.

<sup>2</sup> See Rule 25, p. 172, *ante*.

## Illustrations.

In the following illustrations, *A* is a French citizen who has obtained a grant of naturalization under the Naturalization Act, 1870; *S* is *A*'s son, born in France.

1. *S* is born before the date of *A*'s naturalization as a British subject, at which date *S* is two years old. *A* lives in London, and *S* lives with him till *S* is 21 years of age. *S* is a naturalized British subject.

2. The circumstances are the same as in the foregoing illustration, except that *S* is born after *A* has become a naturalized British subject. *S* is a naturalized British subject.

3. At the time when *A* becomes a naturalized British subject *S* is 16 years of age, and has not hitherto resided in the United Kingdom. From the time *A* becomes a British subject, *S* resides with *A* in London till he attains the age of 19, and then goes to reside in France, where he lives till he is 26. *S* (*semble*) is a naturalized British subject.<sup>1</sup>

4. *S*, at the time of *A*'s naturalization, is 15 years of age; he continues living in France, and never comes to the United Kingdom till he is 22 years old. *S* is not a British subject.

5. *S* is born after *A*'s naturalization, but never resides in the United Kingdom till he is 22 years of age. *S* (*semble*) is not a British subject.<sup>2</sup>

6. *S* being born before *A*'s naturalization lives from the time of such naturalization at *A*'s house in Jersey as his home up to the time of *S*'s coming of age. Jersey is not part of the United Kingdom. *S*, therefore, is not a British subject.

7. *A* after his naturalization resides in France. *S*, who is born before *A*'s naturalization, is at that time 15 years old, and lives for the rest of his infancy as a clerk in London. *S* is not a British subject, for *S*, though he has resided in the United Kingdom, has not resided there with *A*.

8. After *A*'s naturalization, and during the rest of *S*'s infancy, *A* lives habitually in London, and *S*, being in business at Glasgow, resides there. *S* (*semble*) is not a British subject, for he has not resided *with A* in the United Kingdom.<sup>3</sup>

<sup>1</sup> This apparently is so, for *S* has resided "during infancy" with his father *A* in the United Kingdom. If, however, the words "during infancy" mean till the period of infancy has expired, then *S* is not a British subject.

<sup>2</sup> But see note 1, p. 183, *ante*.

<sup>3</sup> This is doubtful, and depends on the meaning of the words "reside with,"

RULE 35.<sup>1</sup>—Where a father being a British subject, or a mother being a British subject and a widow, becomes an alien under any of the foregoing Rules,<sup>2</sup> every child of such father or mother who during infancy has become resident in the country<sup>3</sup> where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, is to be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject.

#### Comment.

This Rule reproduces in substance the Naturalization Act, 1870, s. 10, sub-s. (3).

The conditions under which an infant becomes an alien are three :—

*First.* The father, or the mother being a widow, must have become an alien, and have become naturalized in a foreign country.

It would seem that the mother must continue a widow at the moment when she becomes an alien. In other words, the Naturalization Act, 1870, s. 10, sub-s. (3), or, what is the same thing, the Rule grounded upon it, does not, it is submitted, apply to the case of a widow who, being a British subject, becomes an alien by marriage with a foreigner, *e.g.*, a Frenchman.<sup>4</sup>

which may, and probably do, mean “have a home with the parent,” or may mean, though they probably do not mean, “reside in the United Kingdom” at the same time as the parent.

<sup>1</sup> Naturalization Act, 1870, s. 10, sub-s. (3).

<sup>2</sup> See Rules 26—29, pp. 176—178, *ante*, and compare Rule 31, p. 180, *ante*.

<sup>3</sup> In the Naturalization Act, 1870, s. 10, sub-s. (3), no distinction appears to be drawn between “country” and “state.” See pp. 67, 69—71, *ante*.

<sup>4</sup> This conclusion, which, however, is not certain, rests on the following grounds :—

(1) The widow does not become an alien “being a widow,” but after she has ceased to be a widow.

(2) She possibly does not become an alien “in pursuance of” the Naturalization Act, 1870. The words “in pursuance of” are in sect. 10, sub-sect. (3).

(3) Her becoming an alien under the Act does not of itself involve her being “naturalized in” a foreign country, and sect. 10, sub-sect. (3) (*i.e.*, Rule 35), only applies where such naturalization takes place.

(4) This construction of the enactment is confirmed by a comparison with the Naturalization Act, 1870, s. 10, sub-s. (4), which is reproduced in Rule 36, *post*.

*Secondly.* The child must become "during infancy"<sup>1</sup> resident in the country where the parent, *i.e.*, the father, or the mother being a widow, is naturalized. Though the child must be resident in such country, he need not be resident "with the parent."

*Thirdly.* The child must, according to the law of such country, have become naturalized therein.

### Illustrations.

1. *S*, a natural-born British subject, is the child of *A*, also a natural-born British subject. When *S* is 15, *A* is living in France, and becomes a French citizen, and thereby a statutory alien. *S*, from the time he is 15 up to the age of 23, lives in France, and in consequence of his father's naturalization is, under French law, a French citizen.<sup>2</sup> *S* is an alien.

2. *A* is a natural-born British subject. Whilst *A* is living in France he becomes a naturalized French citizen, and therefore a statutory alien. *S*, *A*'s son, is, after *A*'s naturalization, born in England. *S*, from the time he is two years old till he attains the age of 22, lives in France. *S* is, under French law, a French citizen. *S* (*semble*) becomes an alien.<sup>3</sup>

3. *S* is a natural-born British subject, the child of *A*, also a natural-born British subject. When *S* is 15, *A* and *S* are living in Russia. *A* becomes a naturalized Russian subject, and therefore a statutory alien. *S* continues living in Russia till the age of 22. *S* is not, under Russian law, a Russian subject.<sup>4</sup> *S* remains a British subject.

4. *W* is the widow of an Englishman and natural-born British subject. *S* is her son, age 15, born during the lifetime of her husband. *W*, when *S* is 15, marries a French citizen, and thereby becomes an alien. *S* lives in France from his mother's marriage

<sup>1</sup> See p. 183, *ante*.

<sup>2</sup> "Children under age of a father or of a mother surviving her husband, who becomes naturalized a French citizen, become French citizens, unless, within 'the year after their attaining majority, they decline this status.'" See French Nationality, Law of June 26, 1889, Art. 12, cited Parl. Paper, Mis. No. 3 (1893), C. 7027, p. 46.

<sup>3</sup> Whether *S*'s case may not fall within Rule 22 (p. 166) and Rule 28 (p. 177), *ante*? If it does fall under these Rules, *S* remains a British subject until he makes a declaration of alienage.

<sup>4</sup> The admission to Russian allegiance is always personal, and does not affect children, whether of age or minors previously born. See Parl. Paper, Mis. No. 3 (1893), C. 7027, p. 81, s. 1015.

up to the age of 23. *S*, under French law, is a French citizen.<sup>1</sup> *S* (*semble*) remains a British subject.<sup>2</sup>

RULE 36.<sup>3</sup>—Where a father, or a mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother, who during infancy has become resident in the British dominions with such father or mother, is to be deemed to have resumed the position of a British subject to all intents.

#### Illustrations.

1. *A* is a natural-born British subject. *S*, his son, is born in France. Immediately after the birth of *S*, *A*, who is living in France, becomes a naturalized French citizen, and thereby an alien.<sup>4</sup> *S* (*semble*) becomes, under French law, a French subject. When *S* is 16, *A*, who has been living for five years with *S* in England, is re-admitted to British nationality.<sup>5</sup> *S* lives with *A* in England till the age of 22. *S* resumes<sup>6</sup> the position of a British subject.

2. *A* is a natural-born British subject. He becomes naturalized in France, and thereby becomes a statutory alien. *S*, the son of *A*, is born in France after *A* has become a French citizen. *S* then resides with *A* in London until *S* attains the age of 21. *A*, when *S* is of the age of 18, obtains a certificate of re-admission to British nationality.<sup>7</sup> *S* (*semble*) thereupon becomes a British<sup>8</sup> subject (?).

3. *W*, an Englishwoman, marries *A*, also a natural-born British subject. *S* is their son. After the birth of *S*, *A* being in a foreign country,<sup>9</sup> is there naturalized; and *S*, living there with *A*, becomes under the law of that country naturalized therein. *A* dies. Thereupon *W*, his widow, and *S* reside in London. *W*,

<sup>1</sup> See Law of Nationality, 1889, Art. 12, cited Parl. Paper, Mis. No. 3 (1893), C. 7027, p. 46.

<sup>2</sup> See p. 185, *ante*.

<sup>3</sup> Naturalization Act, s. 10, sub-s. (4).

<sup>4</sup> See Rule 26, p. 176, *ante*.

<sup>5</sup> See Rule 30, p. 178, *ante*.

<sup>6</sup> At what date does *A* resume British nationality? Does *S* become again a natural-born British subject?

<sup>7</sup> See Rule 30, p. 178, *ante*.

<sup>8</sup> Whether *S*, who has never been a British subject, can be "deemed to have resumed" the position of a British subject?

<sup>9</sup> See Rule 26, p. 176, *ante*.

when *S* is 19, is re-admitted to British nationality.<sup>1</sup> *S* resumes the position of a British subject.

RULE 37.—Subject to the exceptions hereinafter mentioned, any person who is not a British subject under Rules 20 to 36, is an alien.

#### Comment.

The foregoing Rules state the circumstances under which a person is, or is not, a British subject according to the principles of the common law, as modified by certain general statutes, and especially by the Naturalization Act, 1870. Any one, therefore, who cannot be shown to be either a natural-born or a naturalized British subject under some one or more of these Rules is *prima facie* an alien.

These Rules, however, are not exhaustive, at any rate, as regards the acquisition of British nationality. There exist more than one exceptional method under which British nationality may be or may have been acquired. These exceptional methods of acquisition, of which this treatise does not give a detailed account, form the exceptions to Rule 37.

#### Illustrations.

1. *A* is a natural-born British subject born in London.<sup>2</sup> *B*, his son, born at Naples,<sup>3</sup> is a natural-born British subject. *C*, the son of *B* and grandson of *A*, is born at Naples,<sup>4</sup> and is also a natural-born British subject. *S*, the son of *C* and great-grandson of *A*, is born at Naples. *S* is an alien.<sup>5</sup>

2. *A* is an Italian subject. *S*, the son of *A*, is born at Naples in 1860. In 1871 *A* becomes a naturalized British subject under Rule 25, and resides permanently in England. *S* continues to reside in Italy till he is 22. He then comes to live with his parents in London. *S* is an alien.<sup>6</sup>

3. *S* is the illegitimate son of English parents, both of whom

<sup>1</sup> See Rules 30, 31, pp. 178—180, *ante*.

<sup>2</sup> See Rule 22, p. 166, *ante*.

<sup>3</sup> See Rule 23, p. 168, *ante*.

<sup>4</sup> See Rule 23, p. 168, *ante*.

<sup>5</sup> *I.e.*, *S* does not fall within either Rule 22 or Rule 23, *ante*. Compare *De Geer v. Stone* (1882), 22 Ch. D. 243.

<sup>6</sup> *I.e.*, he does not come within Rule 34, p. 182, *ante*, since he has not resided in the United Kingdom during infancy.

are natural-born British subjects. He is born at New York. *S* is an alien.<sup>1</sup>

4. *S* is the illegitimate son of French citizens. *S* is born at Paris. After the birth of *S*, *A*, his father, becomes a naturalized British subject in accordance with Rule 25. *S* during his infancy lives with *A* in London. *S* is an alien.<sup>2</sup>

5. *S* is the son of natural-born British parents domiciled at Amsterdam. He is born in Holland, before the marriage of his parents. After his birth his parents, being still domiciled in Holland, intermarry, and by the law of Holland *S* is made legitimate.<sup>3</sup> *S* (*semble*) is an alien.<sup>4</sup>

6. *S* is the son of an Italian subject married to an Englishwoman who was a natural-born British subject. On the death of *S*'s father, immediately after the birth of *S*, his mother returns with *S* to England. She does not obtain a certificate of re-admission to British nationality, but she marries an Englishman as her second husband. *S* resides with his mother in England till he is 22. *S* is (*semble*) an alien.<sup>5</sup>

7. *A* is an Englishman born in England. In 1860 he is in France, and is under French law made a naturalized French citizen. *S*, his son, is born in 1865, and lives in France till 1894. After the passing of the Naturalization Act, 1870, *A* becomes an alien as from 1860.<sup>6</sup> In 1871 *A* is re-admitted to British nationality. *S* has not made any declaration of alienage. Whether *S* is an alien?<sup>7</sup>

8. *A* is a natural-born British subject. In 1865, *A*, in France, becomes a naturalized French citizen, and thereby, in accordance with Rule 26, becomes after 12th May, 1870, a statutory alien. In 1871, *A* is re-admitted to British nationality. *S*, the son of *A*, is born in France immediately after *A*'s re-

<sup>1</sup> See *Shedden v. Patrick* (1854), 1 Macq. 535.

<sup>2</sup> *Ibid.*

<sup>3</sup> See Rule 137, p. 479, *post*.

<sup>4</sup> See *Shedden v. Patrick* (1854), 1 Macq. 535, 612, 639, 640.

<sup>5</sup> Compare Rule 31 and Rule 34, pp. 180, 182, *ante*.

<sup>6</sup> See Rule 26, p. 176, *ante*.

<sup>7</sup> *S* at his birth was according to English law a natural-born British subject, since in 1860 *A* could not renounce British nationality. Whether *S* is or is not a British subject depends upon the effect to be given to the Naturalization Act, 1870, s. 6, which is embodied in Rule 26, p. 176, *ante*, taken with the Naturalization Act, 1870, s. 10, sub-s. (3), which is embodied in Rule 35, p. 185, *ante*.

admission to British nationality, and lives till he is 22 wholly in France. Whether *S* is a British subject? *Seem*, he is.<sup>1</sup>

9. *W*, a Frenchwoman and a widow, obtains a certificate of naturalization. She resides in Jersey in the service of the Crown. *S*, her son, who at the time of her naturalization is 10 years old, lives with her in Jersey till he is 22. *S* is an alien.<sup>2</sup>

*Exception 1.*—Any person is a British subject<sup>3</sup> who is made so by virtue of letters of denization.

**Comment.**

The Crown has still power to grant letters of denization,<sup>4</sup> and a denizen, as already pointed out, is within our definition of a British subject.<sup>5</sup>

*Exception 2.*—Any person is a British subject who is naturalized under or by any Act of Parliament.

**Comment.**

1. A person may still be naturalized under a special Naturalization Act. He then becomes, of course, a naturalized British subject. The exact effect of the Act, *e.g.*, how far it affects past transactions, depends upon the terms of the particular enactment.

2. A person may have been naturalized under some earlier general Naturalization Act, such for example as 7 & 8 Vict. c. 66.

*Exception 3.*—Any person is a British subject within the limits of any British possession, *i.e.*, of any

<sup>1</sup> Compare Rule 30, p. 178, *ante*.

*S* is the son of a natural-born British subject, who, though he at one time lost British nationality, has "resumed" his position as a British subject (see the Naturalization Act, 1870, s. 8), and, it is submitted, has therefore become again a natural-born British subject. If so, *S* comes within Rule 23.

<sup>2</sup> The provisions of Rule 34, as to residence out of the United Kingdom in the service of the Crown, apply only where the father of the infant is in such service. See Naturalization Act, 1895, ss. 1, 2.

<sup>3</sup> For meaning of "British subject," see p. 164, *ante*.

<sup>4</sup> "Nothing in this Act contained shall affect the grant of letters of denization by Her Majesty." Naturalization Act, 1870, s. 14.

<sup>5</sup> See p. 164, *ante*.



colony, plantation, island, territory, or settlement in the British dominions,<sup>1</sup> who is naturalized by any law duly made by the legislature of such possession.

**Comment.**

“ All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty in the same manner, and subject to the same rules in and subject to which Her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession.”<sup>2</sup>

<sup>1</sup> “ And not within the United Kingdom.” See Naturalization Act, 1870, s. 17.

<sup>2</sup> The Naturalization Act, 1870, s. 16.

## BOOK II.

### JURISDICTION.

THE subject of Book II. is Jurisdiction.<sup>1</sup>

The Rules contained in Book II. deal with two different matters.

The first matter is the jurisdiction, in cases which contain any foreign element,<sup>2</sup> of the High Court of Justice.

Under this head are to be considered two different though closely connected questions. The first is, what are, according to English law, the limits to the jurisdiction of the High Court in cases which contain any foreign element, or, in other words, what are the cases containing a foreign element which the High Court has, according to English law, a right to determine or adjudicate upon? The second question is, what are, as far as English Courts can decide the matter, the extra-territorial effects of the exercise of jurisdiction by the High Court?

The second matter is the jurisdiction of Foreign Courts.

Under this head again are to be considered two different though closely connected questions. The first is, what are, according to English law, the proper limits to the jurisdiction of foreign Courts; or, in other words, what are the cases which the Courts of a foreign country have, according to English law, a right to determine or adjudicate upon? The second question is, under what circumstances, and how far, the High Court will give effect in England to the exercise of jurisdiction by the Courts of a foreign country in the form either of judgments or otherwise; or, in other words, what is the effect in England of foreign judgments, or of foreign proceedings, such as sentences of divorce, or adjudications of bankruptcy, which resemble judgments?

Hence Book II. is divided into two Parts.

<sup>1</sup> See Intro. pp. 2, 3, 40—58, *ante*.

<sup>2</sup> See Intro. pp. 1, 2, *ante*.

*Jurisdiction of High Court.*—Part I.<sup>1</sup> deals with the jurisdiction of the High Court. The Rules contained therein define the limits within which, in cases containing any foreign element, the High Court can exercise jurisdiction;<sup>2</sup> they also define the extra-territorial effect, so far as it depends on English law, of the exercise of jurisdiction by the High Court.<sup>3</sup>

The word “jurisdiction” is throughout this Digest used as meaning “the right or authority of a Court”; the word is not therein used as meaning “the area over which a Court has jurisdiction,” *i.e.*, over which it has authority to enforce its judgments. This matter deserves attention, since the term “jurisdiction” is more often than not used in English text-books, judgments, and statutes as meaning the “area of territory over which a Court has jurisdiction.”<sup>4</sup>

*Jurisdiction of Foreign Courts.*—Part II.<sup>5</sup> deals with the jurisdiction of Foreign Courts.

The Rules contained therein define the cases in which (according to the principles recognised by English law) the Courts of a foreign country have a right to exercise jurisdiction,<sup>6</sup> *i.e.*, are Courts of competent jurisdiction.<sup>7</sup>

The Rules contained in Part II. also define the effect in England of the exercise of jurisdiction by Foreign Courts.<sup>8</sup>

Inquiries, however, as to the jurisdiction properly exercisable

<sup>1</sup> Chaps. iv. to xi.

<sup>2</sup> See chaps. i. to x.

<sup>3</sup> See chaps. x., xi.

<sup>4</sup> This is the case, for instance, in the R. S. C. 1883, Ord. XI. r. 1. This rule is in substance embodied in the Exceptions to Rule 46, *post*, but in these Exceptions for the word “jurisdiction” is substituted “England,” *e.g.*, for the words “land situate within the jurisdiction” is substituted “land situate in England.”

For a contrast between the two meanings of the word “jurisdiction,” compare *In re Smith* (1876), 1 P. D. 300, 301, judgment of Sir R. Phillimore; *The Vwar* (1876), 2 P. D. (C. A.) 29, 32; *Cookney v. Anderson* (1862), 31 Beav. 452, 462, judgment of Romilly, M. R.; *Tassell v. Hallen*, [1892] 1 Q. B. 321, 323, judgment of Coleridge, C. J.

<sup>5</sup> Chaps. xii. to xviii.

<sup>6</sup> See chaps. xii. to xvi.

<sup>7</sup> See as to Courts of competent jurisdiction, Intro. p. 39, note 3, and pp. 40, 41, *ante*, and Rule 79, *post*. The Courts, be it noted, of countries other than England, which form part of the British dominions are, for most purposes, to be considered “foreign” Courts, and our judges, in fixing the limits of the jurisdiction properly exercisable, *e.g.*, by a Victorian Court, will, in general, deal with the matter exactly as they would if Victoria were a foreign country in the ordinary sense of the term. As to meaning of “foreign,” see p. 71, *ante*, and as to meaning of “British dominions,” see p. 68, *ante*.

<sup>8</sup> See chaps. xvii. and xviii.

by the Courts of a foreign country and its effect in England always, or nearly always, come before English judges in the form of inquiries as to the effect to be given in England to a foreign judgment, or to some proceeding such as an adjudication in bankruptcy which partakes to a certain extent of the nature of a judgment. If we for the moment, therefore, give a wide sense to the term "foreign judgment," it may be laid down with substantial accuracy that Part II. treats of Foreign Judgments.

## PART I.

### JURISDICTION OF THE HIGH COURT.

#### CHAPTER IV.

##### GENERAL RULES AS TO JURISDICTION.

###### (A) WHERE JURISDICTION DOES NOT EXIST.

###### (i) *In Respect of Persons.*

RULE 38.—The Court has (subject to the exceptions hereinafter mentioned) no jurisdiction<sup>1</sup> to entertain an action<sup>2</sup> or other proceeding against—

(1) any foreign sovereign;<sup>3</sup>

(2) any ambassador or other diplomatic agent<sup>4</sup>

<sup>1</sup> To the persons enumerated in this Rule might, from one point of view, be rightly added the Crown itself, since an *action* cannot be brought against the Crown, nor can an *action in rem* be brought against any ship of the Royal Navy. But the Crown is purposely omitted because proceedings can in effect be under certain circumstances brought in the High Court against the Crown in the form of a petition of right (see especially, Clode, *Petition of Right*, 66, 67; *Com. Dig.*, “*Action*,” c. 1; and (among other cases) *Canterbury v. Attorney-General* (1843), 1 Phillips, 306, 322; *Thomas v. The Queen* (1874), L. R. 10 Q. B. 31; *Rustomjee v. The Queen* (1876), 1 Q. B. D. 487; 2 Q. B. D. (C. A.) 69; *Windsor & Annapolis Rail. Co. v. The Queen* (1886), 11 App. Cas. 607; *Tobin v. The Queen* (1864), 16 C. B. (N. S.) 310; 33 L. J. C. P. 199), and this work is not concerned with the technical rules which merely govern the practice of the High Court.

<sup>2</sup> The word “*action*” has in these Rules the meaning given it by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100, taken together with R. S. C. 1883, Ord. I. r. 1.

<sup>3</sup> *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149. The Court takes judicial cognizance not only of the status but also of the boundaries of a foreign state, and if in doubt will apply for information to the Secretary of State for Foreign Affairs, whose answer is conclusive. *Foster v. Globe Venture Syndicate*, [1900] 1 Ch. 811; *Taylor v. Barclay* (1828), 2 Sim. 213; 29 R. R. 82.

<sup>4</sup> See Hall, *International Law* (5th ed.), p. 172, and 7 Anne, c. 12.

representing a foreign sovereign and accredited to the Crown ;<sup>1</sup>

(3) any person belonging to the suite of such ambassador or diplomatic agent.<sup>2</sup>

An action or proceeding against the property of any of the persons enumerated in this Rule is, for the purpose of this Rule, an action or proceeding against such person.<sup>3</sup>

#### Comment.

(1) *Foreign sovereign*.—No action or other proceeding can be taken in the Courts of this country against a foreign sovereign,<sup>4</sup> nor can the property of a foreign sovereign be seized or arrested.<sup>5</sup>

(2) *An ambassador, &c.*—An ambassador or other diplomatic agent accredited to the Crown by a foreign state cannot, at any rate without his consent,<sup>6</sup> be made defendant here in an action either for breach of contract or, it would seem, for tort, nor can his property be seized.<sup>7</sup>

The Court, however (*semble*), has jurisdiction over an ambassador or diplomatic agent of a foreign sovereign who is not accredited to the Crown, but is in England.<sup>8</sup>

<sup>1</sup> *Parkinson v. Potter* (1885), 16 Q. B. D. 152; *Taylor v. Best* (1854), 14 C. B. 487; 23 L. J. C. P. 89; *Magdalena, &c. Co. v. Martin* (1859), 2 E. & E. 94; *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533; [1894] 2 Q. B. (C. A.) 352.

<sup>2</sup> *Parkinson v. Potter* (1885), 16 Q. B. D. 152; *Fisher v. Begrez* (1832), 1 Cr. & M. 117; *Novello v. Toogood* (1823), 1 B. & C. 554, 562; *Macartney v. Garbutt* (1890), 24 Q. B. D. 368; *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533; [1884] 2 Q. B. (C. A.) 352.

<sup>3</sup> *The Parlement Belge* (1880), 5 P. D. (C. A.) 197.

<sup>4</sup> *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149; *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533. Compare *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1; (1848), 2 H. L. C. 1; *Wadsworth v. Queen of Spain* (1851), 17 Q. B. 171; 20 L. J. Q. B. 488; *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656; 16 L. J. Q. B. 300; *The Jassy*, [1906] P. 270.

<sup>5</sup> *The Parlement Belge* (1880), 5 P. D. (C. A.) 197. Whether the privilege of a sovereign, not to be sued for acts done in his private capacity whilst a sovereign, continues after he has ceased, *e.g.*, by abdication, to be a sovereign? Compare *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 156, judgment of Wills, J., and *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533.

<sup>6</sup> Compare Exception 1, p. 198, *post*.

<sup>7</sup> Compare *Taylor v. Best* (1854), 14 C. B. 487, 521, 522, judgment of Jarvis, C. J., and 423–425, judgment of Maule, J., with *Magdalena Co. v. Martin* (1859), 2 E. & E. 94, 113, 114, judgment of Court commenting upon *Taylor v. Best*.

<sup>8</sup> But see an opposite opinion expressed, Nelson, p. 403, and compare *New Chile Co. v. Blanco* (1888), 4 Times L. R. 346. This case only decides that as a *matter of*

(3) *Members of suite*, &c.—The privilege of the ambassador or diplomatic agent extends to “all persons associated in the performance of the duties of an embassy or legation. . . . And if it be once ascertained that the person was treated at the embassy or legation as a member of the same, and employed from time to time in the work of the legation, the Court will not curiously measure the quantum of the services either required from or rendered by him. But the service must be *bonâ fide*.”<sup>1</sup>

Thus a *charge d'affaires*,<sup>2</sup> a secretary,<sup>3</sup> or a chorister *bonâ fide* employed in the chapel of an embassy,<sup>4</sup> is privileged. But the privilege is that of the ambassador or diplomatic agent.<sup>5</sup>

#### Illustrations.

1. *X* is a foreign sovereign. *X* while on a visit to England incurs debts. The Court has no jurisdiction to entertain an action for the debts.<sup>6</sup>

2. *X* is a foreign sovereign. He is living in England *incognito* under the name of *Y*. Whilst in England, and passing as a British subject, he makes a promise of marriage to *A*, an Englishwoman, who has no knowledge that *X* is a foreign sovereign. *X* breaks his promise of marriage. *A* brings an action against *X*, who pleads that he is a sovereign. The Court has no jurisdiction to entertain the action.<sup>7</sup>

3. An unarmed packet-boat belonging to the King of Belgium, and in the hands of officers employed by him, carries the mails from Belgium to England. The ship also carries merchandise. She negligently runs down an English boat in Dover Harbour. The Court has no jurisdiction to entertain an action against the ship, or to give any redress whatever.<sup>8</sup>

*discretion* the Court will not allow service of a writ out of England on the representative of a foreign state accredited to a foreign state.

<sup>1</sup> Nelson, p. 400. See *Parkinson v. Potter* (1885), 16 Q. B. D. 152.

<sup>2</sup> *Taylor v. Best* (1854), 14 C. B. 487.

<sup>3</sup> *Hopkins v. De Robeck* (1789), 3 T. R. 79.

<sup>4</sup> *Fisher v. Begrez* (1832), 1 Cr. & M. 117; 2 L. J. Ex. 13.

<sup>5</sup> Compare Hall (5th ed.), pp. 172–185.

<sup>6</sup> See *Duke of Brunswick v. King of Hanover* (1848), 2 H. L. C. 1; *Wadsworth v. Queen of Spain* (1851), 17 Q. B. 171; 20 L. J. Q. B. 488. Compare *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656; 16 L. J. Q. B. 300.

<sup>7</sup> *Mighell v. The Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149.

<sup>8</sup> *The Parlement Belge* (1880), 5 P. D. (C. A.) 197. See *The Constitution* (1879), 4 P. D. 39. These cases apparently overrule *The Charkieh* (1873), L. R. 4 A. & E. 59, 120.

4. *X* is the ambassador accredited to the Crown by a foreign state. *X* is indebted to an English company for a call due on shares. The Court has no jurisdiction to entertain an action for the amount of the call.<sup>1</sup>

5. *X* is a British subject. He is accredited to the Crown as Secretary to the Chinese Embassy. His household furniture in London cannot be seized for the non-payment of parochial rates.<sup>2</sup>

6. *X* is the *attaché* of a foreign embassy. He is the lessee of a dwelling-house in London. An action is brought against him by the lessor for the non-payment of rent. The Court has no jurisdiction.<sup>3</sup>

7. *X* is ambassador from the King of Italy to the French Republic. He visits England and incurs debts here, for which an action is brought. *Semble*, the Court has jurisdiction.<sup>4</sup>

*Exception 1.*—The Court has jurisdiction to entertain an action against a foreign sovereign or (*semble*) an ambassador, diplomatic agent, or other person coming within the terms of Rule 38 (2) and (3), if such foreign sovereign, ambassador, or other person, having appeared before the Court voluntarily, waives his privilege and submits to the jurisdiction of the Court.<sup>5</sup>

#### Comment.

A foreign sovereign can submit to the jurisdiction of the Court.

<sup>1</sup> *Magdalena Co. v. Martin* (1859), 2 E. & E. 94; 28 L. J. Q. B. 310; *Taylor v. Best* (1854), 14 C. B. 487; 23 L. J. C. P. 89.

<sup>2</sup> *Macartney v. Garbutt* (1890), 24 Q. B. D. 368.

<sup>3</sup> See *Parkinson v. Potter* (1885), 16 Q. B. D. 152, in which, though it only decides that the *attaché* is not liable to pay rates in respect of the house which he occupies, lays down his exemption from the civil jurisdiction of the Courts in the widest terms. Compare *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533.

<sup>4</sup> When in this Digest, or in any Illustration, it is stated that the Court "has jurisdiction" or "has no jurisdiction," what is meant is that the Court has jurisdiction or has no jurisdiction (as the case may be) in respect of the matter (*e.g.*, to entertain an action) to which the particular Rule, Exception or Illustration refers.

<sup>5</sup> See *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 157, 160, judgments of Esher, M. R., and of Lopes, L. J.; *Parkinson v. Potter* (1885), 16 Q. B. D. 152. But conf. *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533, judgment of Wright, J. This, of course, is an application of Rule 42, p. 211, *post*, but is more conveniently treated of with special reference to Rule 38, p. 195, *ante*.



"Suppose," asks Maule, J., "a foreign sovereign in this country were desirous to have some question decided by the Courts of this Kingdom, could he not do so?"<sup>1</sup> This question must clearly be answered in the affirmative.

This submission must be an unmistakable election to submit to the Court's jurisdiction, and must take place at the time when the Court is about, or is being asked, to exercise jurisdiction over him.<sup>2</sup>

The principles applicable to submission by a sovereign to the jurisdiction of the Court probably apply to the like submission by an ambassador,<sup>3</sup> or other diplomatic agent accredited to the Crown.

*Question.*—*Has the Court jurisdiction to entertain a counter-claim against a foreign sovereign or an ambassador?*

The answer to our inquiry is this: A sovereign or ambassador who brings an action in the High Court undoubtedly submits himself to its jurisdiction in regard to that action,<sup>4</sup> but no further. This principle decides the extent to which the Court has jurisdiction to entertain a counter-claim against, *e.g.*, an ambassador who is plaintiff in an action. If the counter-claim is really a defence to the action, *i.e.*, is a set-off, or something in the nature of a set-off, the Court has a right to entertain it. If the counter-claim is really a cross-action, the Court has no jurisdiction to entertain it.

<sup>1</sup> *Taylor v. Best* (1854), 23 L. J. C. P. 89, 93, per Maule, J.

<sup>2</sup> *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 159, judgment of Esher, M. R. Compare Hall (5th ed.), pp. 174, 175, n. 1.

<sup>3</sup> It may, however, be argued that an action can under no circumstances be maintained in England against an ambassador, &c.; for the Diplomatic Privileges Act. 1708 (7 Anne, c. 12), "prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution." *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533, 542, *per curiam*, compared with *Magdalena Steam Co. v. Martin* (1859), 2 E. & E. 94; 28 L. J. Q. B. 310. The suggested argument is inconsistent with *Taylor v. Best* (1854), 14 C. B. 487. (Compare, especially, *Ibid.*, 522, 523, judgment of Jervis, C. J.) But it is strengthened by the language of the Court in *Musurus Bey v. Gadban*, [1894] 2 Q. B. (C. A.) 352, 357, judgment of A. L. Smith, L. J., and 360—362, judgment of Davey, L. J.

The Statute of Limitations does not run against a diplomatic agent who contracts a debt in England during his tenure of office, nor (*semble*) for a reasonable time after the end of such tenure. *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533; [1894] 2 Q. B. (C. A.) 352.

<sup>4</sup> *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190, and [1897] 2 Ch. (C. A.) 487. Compare *Yorkshire Tannery v. Eglinton Chemical Co.* (1884), 54 L. J. Ch. 81, 83, judgment of Pearson, J.

### Illustrations.

1. *X* is a foreign sovereign. Whilst living *incognito* in England under the name of *Y*, he incurs debts to *A*, who brings an action against *X* under his proper name and description. *X* accepts service of the writ, and defends the action on its merits. In the course of the evidence it is shown that *X* is a foreign sovereign. The Court has jurisdiction.<sup>1</sup>

2. *X* is an ambassador accredited by the Czar to the Crown. *A* brings an action against *X* for an alleged debt of 10*l*. *X* accepts service, does not raise the defence that the Court has no jurisdiction, and defends the case on the merits. *Seemle*, the Court has jurisdiction (?).<sup>2</sup>

3. *A* is the minister of the French Republic accredited to the Crown. *A* brings an action against *X* for a debt of 100*l*. *X*, in his counter-claim, claims 100*l*. due to him as a debt from *A*. The Court (*seemle*) has jurisdiction to entertain the counter-claim.

4. The circumstances are the same as in Illustration No. 2, except that *X*'s counter-claim is a claim for damages against *A* in respect of a libel by *A* upon *X*. The Court has no jurisdiction to entertain the counter-claim.<sup>3</sup>

*Exception 2.*—The Court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade(?).

### Comment.

Under the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), s. 5, it is provided that "no merchant or other trader whatsoever, "within the description of any of the statutes against bankrupts, "who hath or shall put himself into the service of any such "ambassador or public minister, shall have or take any benefit by "this Act;" and apparently the result is that the privilege of

<sup>1</sup> Compare *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 159, judgment of Esher, M. R. See, however, *Imperial Japanese Government v. P. & O. Co.*, [1895] A. C. 644.

<sup>2</sup> See note 3, p. 199, *ante*.

<sup>3</sup> See *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190, and [1897] 2 Ch. (C. A.) 487.

exemption from being sued, which is possessed by the servant of an ambassador, is lost by the circumstance of trading.<sup>1</sup>

(ii) *In Respect of Subject-Matter.*

RULE 39.—Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land<sup>2</sup>), or
- (2) the recovery of damages for trespass to such immovable.<sup>3</sup>

Comment.

This Rule is now well established, and, whatever be its historical origin,—a matter still open to discussion,—is on the whole in conformity with that “principle of effectiveness” which, as already explained,<sup>4</sup> forbids a Court to give judgments which it cannot render effective, or which it can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court.

*As to clause 1.*—The principle of effectiveness amply justifies, even though it may not historically account for, the refusal of English judges to adjudicate upon the title to, or the right to the possession of, foreign land.

*As to clause 2.*—Respect for the principle of effectiveness does not, it may be said, require or justify the refusal on the part of English judges to entertain actions for such injuries to foreign land as admit of compensation in damages. This remark, however, is more plausible than sound. It is impossible to keep an action

<sup>1</sup> Compare Hall (5th ed.), p. 178.

<sup>2</sup> *Mostyn v. Fabrigas* (1774), Cowp. 161; *In re Hawthorne* (1883), 23 Ch. D. 743; *Companhia de Moçambique v. British S. Africa Co.*, [1892] 2 Q. B. (C. A.) 358 (especially p. 413, judgment of Fry, L. J.); *Boyse v. Colclough* (1854), 1 K. & J. 124; *Pike v. Hoare* (1763), 2 Eden, 182.

See, on the whole subject of actions in respect of foreign land, Story, ss. 554, 555; Foote (3rd ed.), pp. 184—201; *Penn v. Baltimore* (1750), 1 Ves. 444; 2 Wh. & Tu. (2nd ed.) 767; *Mostyn v. Fabrigas* (1774), 1 Sm. L. Cas. (9th ed.) 628.

<sup>3</sup> *British S. Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602; *Doulson v. Matthews* (1792), 4 T. R. 503; 2 R. R. 448.

<sup>4</sup> See Intro., General Principle No. III., p. 40, *ante*.

for trespass to land free from questions as to the title to the land; and injustice<sup>1</sup> would often ensue were our Courts to give damages for trespass to land in cases in which they could not deal with the right to the ownership or the possession of the land. The refusal, therefore, to entertain any action whatever with regard to foreign land is, whatever its origin, a legitimate application or extension of the principle of effectiveness.

This Rule does not prevent the Court from entertaining an action for a breach of contract, whether express or implied, with regard to foreign land, and hence the Court may sometimes entertain actions which look at first sight very like proceedings for damage done to foreign land, or to a foreign immovable. Thus if *X*, a British subject domiciled in England, becomes tenant of a house in France, it may well be an express or implied term of the contract between *X* and *A*, his landlord, that *X* shall make good any damage caused to the house through the negligence of *X*. The house is burnt down through *X*'s negligence. The Court has jurisdiction to entertain an action by *A* against *X* for the damage done to the house through *X*'s negligence, *i.e.*, for breach of contract.

### Illustrations.

1. *A* brings an action to obtain possession of lands in Canada. The Court has no jurisdiction.<sup>2</sup>

2. The title to a house at Dresden is in dispute between *X* and *A*. *X* sells the house, receives part of the purchase-money, and takes a mortgage for the balance. *X* and *A* are both in England. *A* brings an action against *X* to make him account for the purchase-money. The Court has no jurisdiction.<sup>3</sup>

3. Action by *A*, a foreigner, against *X*, a foreigner, and against *Y & Co*, an English company formed for working a Russian mine, to restrain the English company from paying to *X* part of the

<sup>1</sup> Compare *British S. Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, 625, judgment of Herschell, C.

<sup>2</sup> *Doulson v. Matthews* (1792), 4 T. R. 503; 2 R. R. 448; *Roberdeau v. Rouse* (1738), 1 Atk. 543. Compare General Principle No. II. (C), p. 34, *ante*. We have here an illustration of the maxim that it is not the duty, as it is not within the power of an English Court to enforce obedience to the law of a foreign country in such foreign country. "*Morocco Bound*" *Syndicate, Ltd. v. Harris*, [1895] 1 Ch. 534.

<sup>3</sup> *In re Hawthorne* (1883), 23 Ch. D. 743. Conf. *White v. Hall* (1806), 12 Ves. 321.

profits of the mine which *A* claims by way of commission. The Court has no jurisdiction.<sup>1</sup>

4. Action by *A & Co.*, a Portuguese company, against *X & Co.*, an English company, for trespass to *A & Co.*'s land in South Africa. The Court has no jurisdiction.<sup>2</sup>

5. *A* files a bill for discovery to obtain inspection of documents in *X*'s possession in England in aid of proceedings about to be taken for recovery of land in India. The Court has no jurisdiction.<sup>3</sup>

*Exception.*<sup>4</sup>—Where the Court has jurisdiction to entertain an action against a person under either Rule 45,<sup>5</sup> or under any of the Exceptions to Rule 46,<sup>6</sup> the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either—

- (a) a contract between the parties to the action, or
- (b) an equity between such parties<sup>7</sup>

with reference to such immovable.

<sup>1</sup> *Matthaei v. Galatzin* (1874), L. R. 18 Eq. 340.

"A foreigner resident abroad cannot bring another foreigner into this Court respecting property with which this Court has nothing to do. This Court is not to be made a vehicle for settling disputes arising between parties resident abroad." *Ibid.*, pp. 348, 349, per Malins, V.-C. *Seem*, the real reason is the fact of the property being abroad. *A*, an alien, may certainly sue *X*, an alien, in England for breach of contract. Compare *Blake v. Blake* (1870), 18 W. R. 944; *Cookney v. Anderson* (1862), 31 Beav. 452. See, also, *Whitaker v. Forbes* (1875), 1 C. P. D. (C. A.) 51. But contrast *Buenos Ayres Co. v. Northern Rail. Co.* (1877), 2 Q. B. D. 210.

<sup>2</sup> *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

<sup>3</sup> *Reimer v. Marquis of Salisbury* (1876), 2 Ch. D. 378.

"You cannot, in my opinion, maintain a suit in this country for the recovery of land in the colonies or a foreign country. If, then, this bill is for discovery in aid of a suit which cannot be maintained in this Court, that is, if the plaintiff does not show a title to sue, he shows no title to discovery." *Ibid.*, p. 385, judgment of Malins, V.-C. See also *Norton v. Florence Land, &c. Co.* (1877), 7 Ch. D. 332; *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681.

<sup>4</sup> See, as to this anomalous exercise of jurisdiction, Westlake (4th ed.), pp. 210—214, ss. 172—174; Foote, chap. vi., pp. 184—197; and for its application to an administration action, see *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453.

<sup>5</sup> See p. 217, *post*.

<sup>6</sup> See p. 222, *post*.

<sup>7</sup> As to what may constitute an equity, compare illustrations, pp. 206, 207.

## Comment.

The principle on which this exception, originally derived from the practice of the Court of Chancery, rests, is that though the Court has no jurisdiction to determine rights over foreign land, yet, where the Court has jurisdiction over a person *from his presence in England*, or now from the Court having jurisdiction to serve him with a writ or notice thereof though he is out of England,<sup>1</sup> the Court has jurisdiction to, and will compel him to dispose of, or otherwise deal with, his interest in foreign land so as to give effect to obligations which he has incurred with regard to the land. The obligations which the Court will thus enforce are not easily brought under any one definite head. Westlake describes them as obligations relating to immovables which arise from, or as from, a person's own contract or tort.<sup>2</sup> Foote states that "the English Courts, acting *in personam* and not *in rem*, will make

*post*; and contrast *Hicks v. Powell* (1869), L. R. 4 Ch. 741, and *Harrison v. Harrison* (1873), L. R. 8 Ch. 342. As to equitable interests in foreign land, and how far trusts can be engrafted upon foreign land, see Lewin on Trusts (8th ed.), chap. iv., paras. 4—6, pp. 48—50.

<sup>1</sup> *Jenney v. Mackintosh* (1886), 33 Ch. D. 595; (1889), W. N. 94; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

"It is argued," says Byrne, J., in the last case, "that there is no precedent or authority for the exercise of the jurisdiction *in personam*, unless against persons actually within this country, and that to allow service of notice of writ upon a foreigner resident abroad, and then to act *in personam* against him, would in effect be to enlarge or extend the jurisdiction of the Court in a manner not authorized by principle or authority. . . .

"In the present case the service is authorized by the terms of the rule I have referred to [R. S. C., Ord. XI. r. 1 (g)], and I consider that to allow service in accordance with that rule is not to extend jurisdiction, but to enable the old jurisdiction to be exercised in a case where, at one time, it could not have been exercised by reason of defective rules of procedure." [1902] 2 Ch. 132, 142, 143. Compare *Buxtree v. Great North-West Central Railway* (1898), 14 T. L. R. 448, and see as to Ord. XI. r. 1 (g), Rule 46, Exception 7, p. 243, *post*.

The original jurisdiction of the Court of Chancery depended upon the defendant being in England, and thus within the jurisdiction of the Court in a way which enabled the Court to compel him to, *e.g.*, perform a contract with regard to foreign land. As to the legitimacy of the extension of the Court's jurisdiction as regards foreign land to cases in which, under the present practice, the Court can serve a person with a writ though he is not in England, some doubt may be felt. See Foote (3rd ed.), p. 187, note *a*. But the authority for such extension seems strong. The cases of its exercise arise mainly, if not entirely, under Ord. XI. r. 1 (g). (Rule 46, Exception 7.) They might (*semble*) arise in some other cases, *e.g.*, under Ord. XI. r. 1 (c). (Rule 46, Exception 3, p. 229, *post*.)

<sup>2</sup> See Westlake, s. 172. Compare *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 40, language of Selborne, C.

“decrees, upon the ground of a contract or other equity subsisting between the parties, respecting property situated out of the jurisdiction,”<sup>1</sup> *i.e.*, out of England.

This anomalous jurisdiction, it has been judicially laid down, “is grounded, like all other jurisdiction of the Court [of Chancery], not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the Court. If the Court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad;—if, for instance, as in *Penn v. Lord Baltimore*,<sup>2</sup> it can decree the performance of an agreement touching the boundary of a province in North America, or, as in the case of *Toller v. Carteret*,<sup>3</sup> can foreclose a mortgage in the Isle of Sark, . . . in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign Court.”<sup>4</sup>

“The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction.”<sup>5</sup>

This indefinite jurisdiction is exceptional,<sup>6</sup> and is (substantially) confined to cases in which there is either a contract between the parties, or something of the nature of a trust.<sup>7</sup>

The Court, further, will not make a decree which runs contrary to the law of the country where the land affected is situate. “If, indeed, the law of the country where the land is situate should

<sup>1</sup> See Foote (3rd ed.), 185.

<sup>2</sup> 1 Ves. Sen. 444.

<sup>3</sup> 2 Vern. 494.

<sup>4</sup> *Lord Portarlington v. Soulby* (1834), 3 My. & K. 104, 108, judgment of Brougham, C.

<sup>5</sup> *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 40, per Selborne, C.

<sup>6</sup> See for example, *In re Hawthorne* (1883), 23 Ch. D. 743; *Matthaei v. Galitzin* (1874), L. R. 18 Eq. 340; *Norton v. Florence Land Co.* (1877), 7 Ch. D. 332.

<sup>7</sup> *Kildare v. Eustace* (1686), 1 Vern. 419; and see illustrations, *post*. “As to lands lying in a foreign country, the Court will enforce *natural equities*, and compel the specific performance of *contracts*, provided the parties be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree.” Lewin, *Law of Trusts* (8th ed.), p. 48.

“ not permit, or not enable, the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act ; but when there is no such impediment, the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities.”<sup>1</sup>

### Illustrations.

1. *X*, who is in England, has executed articles of agreement with *A* in England with reference to land in Canada. *A* brings an action against *X* for specific performance. The Court has jurisdiction.<sup>2</sup>

2. *A* is the owner of an estate in St. Christopher, West Indies. *X*, a creditor of *A*'s, by unfair use of process in local Courts, causes *A*'s estate to be sold, and purchases it. *X* is in England. The Court has jurisdiction to decree reconveyance of estate.<sup>3</sup>

3. A decree is made in the Court directing an inquiry to ascertain the amount of the mortgage debt due on lands in a West Indian Island in proceedings for redemption, all parties being in this country. The Court has jurisdiction to grant injunction restraining mortgagee of estate from proceeding on a bill of foreclosure in the colonial Court.<sup>4</sup>

4. *A*, residing in England, brings an action against *X* and *Y*, also residing in England, to enforce a lien on land in Prussia. *Seem*, that, if *A* can show special circumstances arising out of the dealings between the parties, the Court may have jurisdiction to entertain the action.<sup>5</sup>

5. *X* mortgages land in one of the colonies to *A*. *X* is in

<sup>1</sup> *Ex parte Pollard* (1840), Mont. & Ch. 239, 250 ; 4 Deacon, 27 ; Westlake (4th ed.), p. 210, s. 172.

<sup>2</sup> See *Penn v. Baltimore* (1750), 1 Ves. Sen. 444 ; *Tulloch v. Hartley* (1841), 1 Y. & Coll. 114.

<sup>3</sup> *Cranstoun v. Johnston* (1796), 3 Ves. 170 ; (1800), 5 Ves. 277. See *Mercantile Investment, &c. Co. v. River Plate Co.*, [1892] 2 Ch. 303. But contrast *White v. Hall* (1806), 12 Ves 321. See *Jackson v. Petrie* (1804), 10 Ves. 164.

<sup>4</sup> *Beckford v. Kemble* (1822), 1 S. & St. 7. See *Booth v. Leicester* (1837), 1 Keen, 579 ; *Bunbury v. Bunbury* (1839), 1 Beav. 318.

<sup>5</sup> *Norris v. Chambers* (1861), 3 De G. F. & J. 583 ; 30 L. J. Ch. 285. Conf. *Harrison v. Harrison* (1873), L. R. 8 Ch. 342.



England. The Court has jurisdiction to make a foreclosure decree against X.<sup>1</sup>

6. The Court has jurisdiction to take accounts between A and X, tenants of foreign land. A and X are in England.<sup>2</sup>

7. A brings an action against X, who is in England, to be relieved of a charge on A's land in Ireland, which charge has been obtained by fraud. *Semble*, the Court has jurisdiction.<sup>3</sup>

8. A brings an action against X, Y and Z to enforce against real estate in Trinidad the trusts of a creditor's deed. X, Y and Z are the persons in whom the legal estate is outstanding. X and Y reside in England, and Z resides in Trinidad. The Court has jurisdiction to entertain the action against X and Y, and also against Z,<sup>4</sup> i.e., he may be served with a writ in Trinidad.<sup>5</sup>

9. A brings an action against X, who, though out of England, is domiciled or ordinarily resident in England, to be relieved of a charge on A's land in Ireland, which charge has been obtained by fraud. *Semble*, the Court has jurisdiction.<sup>6</sup>

RULE 40.<sup>7</sup>—The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign country.

### Comment.

“The common law considers crimes as altogether local, and cognisable and punishable exclusively in the country where they

<sup>1</sup> *Paget v. Ede* (1874), L. R. 18 Eq. 118. Compare *Westlake* (4th ed.), 213, 214. See *Beckford v. Kemble* (1822), 1 S. & St. 7.

<sup>2</sup> *Scott v. Nesbitt* (1808), 14 Ves. 438. Compare *Carteret v. Petty* (1676), 2 Swanst. 323 (n.), where the defendant was out of England.

<sup>3</sup> *Arglase v. Muschamp* (1682), 1 Vern. 75. See *Kildare v. Eustace* (1686), 1 Vern. 419; *Angus v. Angus* (1737), West. 23; *Clarke v. Ormonde* (1821), Jacob, 108. Conf. *Beckford v. Kemble* (1822), 1 S. & St. 7; *Bunbury v. Bunbury* (1839), 1 Beav. 318; *Tulloch v. Hartley* (1841), 1 Y. & Coll. 114.

<sup>4</sup> *Jenney v. Mackintosh* (1886), 33 Ch. D. 595; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

<sup>5</sup> Under R. S. C. 1883, Ord. XI. r. 1 (g). See Exception 7 to Rule 46, p. 243, *post*.

<sup>6</sup> See *Duder v. Amsterdamsch Truste s Kantoor*, [1902] 2 Ch. 132; *Bawtrees v. Great North-West Central Railway* (1898), 14 T. L. R. 448; R. S. C., Ord. XI. r. 1 (c); and Exception 3, p. 229, *post*.

<sup>7</sup> Story, ss. 620—622; Piggott (2nd ed.), p. 209; *Folliott v. Ogden* (1789), 1 H. Bl. 123; 2 R. R. 736; *Huntington v. Attrill*, [1893] A. C. 150; *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265; *Huntington v. Attrill* (1892), 146 U. S. 657. Compare Intro., p. 36, *ante*, and Rule 125, p. 458, *post*.

“are committed . . . The same doctrine has been frequently  
 “recognised in America. . . . Chief Justice Marshall, in  
 “delivering the opinion of the Supreme Court, said: ‘The Courts  
 “of no country execute the penal laws of another.’”<sup>1</sup>

“The rule that the Courts of no country execute the penal laws  
 “of another applies not only to prosecutions and sentences for  
 “crimes and misdemeanours, but to all suits in favour of the  
 “State for the recovery of pecuniary penalties for any violation  
 “of statutes for the protection of its revenue, or other municipal  
 “laws, and to all judgments for such penalties. If this were not  
 “so, all that would be necessary to give ubiquitous effect to a  
 “penal law would be to put the claim for a penalty into the shape  
 “of a judgment.”<sup>2</sup>

Hence the High Court cannot entertain either an action for the recovery of a penalty due under the law of a foreign country, or an action on a foreign judgment for such penalty.<sup>3</sup>

*Question.*—*What is a penal law?* The application of Rule 40 raises the difficult question, when is a law to be considered a penal law? or, what is really the same inquiry under another form, when is an action to be considered a penal action?

These inquiries are to be answered as follows: A “penal law” is strictly and properly a law which imposes punishment for an offence against the state; and a “penal action” is a proceeding for the recovery, in favour of the state, of a penalty due under a penal law.<sup>4</sup> A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrong-doer, in favour of the person wronged, which is not limited to the damages suffered by him; and an action for enforcing such liability, by the recovery of the penalty due to the person wronged, is not a penal action: the essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual.<sup>5</sup>

<sup>1</sup> See Story, ss, 620, 621, citing *The Antelope*, 10 Wheat. 66, 123. And compare *Folliott v. Ogden* (1789), 1 H. Bl. 123; 2 R. R. 736; *Ogden v. Folliott* (1790), 3 T. R. 726; *Rafael v. Verelst* (1775), 2 W. Bl. 983.

<sup>2</sup> *Wisconsin v. Pelican Co.* (1858), 127 U. S. 265, 290, *per curiam*. The passage is cited with approval not only by the Supreme Court in *Huntington v. Attrill* (1892), 146 U. S. 657, 671, but also by the Privy Council in *Huntington v. Attrill*, [1893] A. C. 150, 157.

<sup>3</sup> As to effect of foreign judgments, see chap. xvii., *post*, and especially Exception (p. 414) to Rule 102, *post*.

<sup>4</sup> *Huntington v. Attrill* (1892), 146 U. S. 657, 667, opinion of Supreme Court; *Huntington v. Attrill*, [1893] A. C. 150, 156, 157, judgment of Privy Council.

<sup>5</sup> *Ibid.*

A proceeding, then, in order to come within Rule 40, must be in the nature of a suit in favour of the state whose law has been infringed.

### Illustrations.

1. *X* incurs a penalty of 100% for the infringement of the law of a foreign country prohibiting the sale of spirits. The penalty is recoverable in the Courts of the foreign country in an action for debt brought by an official of the foreign government. *X* is in England. The proper official brings an action in the High Court for the recovery of the 100%. The Court has no jurisdiction.<sup>1</sup>

2. The circumstances are the same as in Illustration 1, except that the penalty is recoverable under the law of the foreign country by an informer, and *A*, the informer, brings an action for the recovery of the 100% due from *X*. The Court has no jurisdiction.<sup>2</sup>

3. Under the law of an American State, *X*, the treasurer of an insurance company in the State, incurs a penalty, amounting in English money to 100%, for not making certain returns in respect of the business of the company. The penalty is, under the law of the State, recoverable by a State official. Half the penalty, when recovered, is to be paid by him into the State treasury, and half is to be retained for himself. *A*, the State official, obtains judgment against *X* in the Court of the American State for the 100%. *X* is in England. *A* brings an action on the judgment against *X*. The Court has no jurisdiction.<sup>3</sup>

4. Under the law of New York, the director of a trading corporation, who signs certain certificates with regard to the affairs of the corporation knowing such certificates to be false, becomes liable for the debts of the corporation. Under this law, *X*, a director of a New York company, becomes liable to *A*, a creditor for a debt due from the company. *X* is in England. *A* brings an action against *X* for the debt. *Semble*, the Court is not, under Rule 40, deprived of jurisdiction.<sup>4</sup>

5. The circumstances are the same as in Illustration 4, except

<sup>1</sup> Compare *Huntington v. Attrill*, [1893] A. C. 150.

<sup>2</sup> *Semble*, that this is so, even though the penalty goes wholly to the informer; for the object of the action is not to remedy a wrong done to the plaintiff, but to punish the defendant for violating the law of the foreign state. Compare *Robinson v. Currey* (1881), 7 Q. B. D. (C. A.) 465, and *Saunders v. Wiel*, [1892] 2 Q. B. (C. A.) 321. See *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265.

<sup>3</sup> See *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265.

<sup>4</sup> *Huntington v. Attrill*, [1893] A. C. 150. It is, of course, possible that the jurisdiction of the Court may be excluded under some other Rule in this Digest.

that *A* has recovered judgment in the Court of New York for the penalty, and brings an action against *X* in England on the judgment. *Semble*, the Court is not, under Rule 40, deprived of jurisdiction.<sup>1</sup>

## (B) WHERE JURISDICTION EXISTS.

### (i) *In Respect of Persons.*

RULE 41.<sup>2</sup>—Subject to Rule 38, and to the exception hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the Court, *i.e.*, any person may be a party to an action or other legal proceeding in the Court.

### Comment.

The High Court, subject to the very slight limitations referred to in our Rule, is open to persons of every description. No one is, on account of his mere position or status, precluded from being plaintiff in an action, or from taking legal proceedings in the Court. Nor, again, is any one, on account of his mere position or status, exempt from the liability to be made defendant in an action, or, speaking generally, to have legal proceedings taken against him in the High Court. In this matter, a British subject and an alien,<sup>3</sup> a natural person and a corporation,<sup>4</sup> an infant, a married woman, a peer, and (subject, of course, to the effect of Rule 38) a foreign sovereign,<sup>5</sup> stand in exactly the

<sup>1</sup> *Huntington v. Attrill*, [1893] A. C. 150. This case throws light on the nature of a "penal law."

<sup>2</sup> Compare Dicey, *Parties to an Action*, pp. 1—4; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28, judgment of Court delivered by Willes, J. Compare, especially, *Illustrations to Rule 45, post*.

<sup>3</sup> *De la Fega v. Vianna* (1830), 1 B. & Ad. 284; *Melan v. Duke de Fitzjames* (1797), 1 B. & P. 138; *Worms v. De Valdor* (1880), 49 L. J. Ch. 261.

<sup>4</sup> *Magdalena Co. v. Martin* (1859), 2 E. & E. 94; *Carron Co. v. Maclaren* (1855), 5 H. L. C. 416; *Westman v. Aktiebolaget, &c.* (1876), 1 Ex. D. 237.

<sup>5</sup> *Emperor of Austria v. Day* (1861), 30 L. J. Ch. 690; 3 De G. F. & J. 217; *United States v. Prioleau* (1865), 2 H. & M. 559; *Republic of Peru v. Dreyfus* (1888), 38 Ch. D. 348. There is no rule that the monarch or other titular head of a foreign state is the only person who can sue here in respect of the public property or interest of that state; and *semble*, that an action on a contract made in a foreign country with a foreign government can be brought on behalf of that government

same position. No foreigner is, as such, required even to give security for costs.<sup>1</sup>

*Exception.*—The Court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the license or protection of the Crown.<sup>2</sup>

The term “alien enemy” includes any British subject or citizen of a neutral state voluntarily residing during a war with Great Britain in a hostile country.<sup>3</sup>

RULE 42.<sup>4</sup>—The Court has jurisdiction in an action<sup>5</sup> over any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court.

#### Comment.

A person who would not otherwise be subject to the jurisdiction of the Court may preclude himself by his own conduct

by any person with whom the contract is made under the law of such foreign country. *Fzquerdo v. Clydebank Engineering, &c. Co.*, [1902] A. C. 524.

<sup>1</sup> The Court can, it is true, in its discretion compel a plaintiff, who is permanently residing out of England, to give security for costs, but this can be done in the case of a British subject no less than in that of an alien.

<sup>2</sup> *Wells v. Williams* (1697), 1 Salk. 46; *Le Bret v. Papillon* (1804), 4 East, 502; 7 R. R. 618; *Alcmous v. Nigreu* (1854), 4 E. & B. 217; 24 L. J. Q. B. 19; *Antoine v. Morshead* (1815), 6 Taunt. 237; *Daubuz v. Morshead* (1815), 6 Taunt. 332. But the Court has jurisdiction after the restoration of peace to entertain an action by an alien who was an enemy during the war in respect of a contract made before the commencement of the war. *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484.

<sup>3</sup> See, as to disabilities of an alien enemy, Dicey, *Parties to Action*, pp. 3, 4.

It may be suggested that to this exception should be added another, viz., that the Court has no jurisdiction to entertain an action brought by the Crown. But though the Crown cannot bring an action, the Crown can take proceedings in the High Court by information, &c., e.g., for recovery of debts; and with the technical rules as to practice, except in so far as they determine the jurisdiction of the Court, this Digest is not concerned.

<sup>4</sup> This Rule is manifestly a mere application of General Principle No. IV., p. 44, *ante*. See *Boyle v. Sacker* (1888), 39 Ch. D. (C. A.) 249; *Tharsis Sulphur Co. v. La Société des Métaux* (1889), 58 L. J. Q. B. 435 (action *in personam*). See further, p. 261, note 2, *post*.

<sup>5</sup> The word “action” does not include a suit for divorce. See Rule 49, p. 261, *post*; and as to *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420; 31 L. J. P. & M. 37, see *Armitage v. Att.-Gen.*, [1906] P. 135, 140.

from objecting to its jurisdiction, and thus give the Court an authority over him which, but for his submission, it would not possess.<sup>1</sup>

This submission may take place in various ways. A defendant in an action, who does not at the right stage take objection to the jurisdiction of the Court, but defends his case upon the merits, submits to its authority. So, again, does a person who, though he would not be otherwise liable to the Court's jurisdiction, has made it part of a contract that questions arising under the contract shall be decided by the Court. A person, further, who comes before the Court as a plaintiff in general gives the Court jurisdiction to entertain a counter-claim, or, in other words, a cross-action; against him.<sup>2</sup> Whether a person has or has not submitted to the jurisdiction of the Court depends upon the circumstances of the case; but the Court, as regards its own jurisdiction, though not invariably as regards the jurisdiction of foreign Courts, maintains the principle that submission gives jurisdiction.

In the application of this principle two things must be borne in mind.

The first is that the principle is applicable only to actions or to proceedings, which are strictly of the nature of an action. The second is that submission can give the Court jurisdiction only to the extent of removing objections thereto which are purely personal to the party submitting, as, for example, the objection, in the case of a defendant, that he has not been duly served with a writ; submission cannot give the Court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the Court.<sup>3</sup> Hence the principle does not apply to a suit for divorce.<sup>4</sup>

<sup>1</sup> See Intro., General Principle No. IV., p. 44, *ante*; and compare, for an example of such submission, Exception 1 to Rule 38, p. 198, *ante*.

<sup>2</sup> See *Yorkshire Tannery v. Eglinton Co.* (1884), 54 L. J. Ch. 81, 83, judgment of Pearson, J.

<sup>3</sup> Light is thrown, as to the limits within which consent or submission can give jurisdiction, by cases on prohibition, such as *Farquharson v. Morgan*, [1894] 1 Q. B. (C. A.) 552; *Mayor of London v. Cox* (1867), L. R. 2 H. L. 239; *Broad v. Perkins* (1888), 21 Q. B. D. (C. A.) 533; *Buggin v. Bennett* (1767), 4 Burr. 2035.

<sup>4</sup> Compare *Armitage v. Att.-Gen.*, [1906] P. 145, 140, judgment of Sir J. Gorell Barnes, which in effect, and rightly, it is submitted, overrules *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420. See p. 261, *post*.

## Illustrations.

1. *A* brings an action against *X*, who has not been duly served with a writ. *X* takes no objection to the jurisdiction of the Court on account of want of due service, but defends himself on the merits of his case. The Court has jurisdiction to entertain an action against *X*.

2. *A* brings an action against *X*, who makes a counter-claim against *A* in respect of damages due from *A* to *X* for breach of a contract made between *A* and *X* in France, and to be performed wholly in France. *A* is a French subject domiciled in France and has never been in England. If *X* had brought an action against *A* for the breach of contract, *A* might have objected to the jurisdiction of the Court. *A*'s submission (*semble*) gives the Court jurisdiction to entertain the counter-claim.<sup>1</sup>

3. *X* is a French company incorporated according to French law and carrying on business at Paris, where is the company's principal office. *X* has no place of business in the United Kingdom. *A* is a copper company with registered office at Glasgow, carrying on business at Newcastle-on-Tyne. There is a contract between *A* and *X* whereby *A* agrees to sell, and *X* agrees to purchase, copper. It is part of the contract that it should be construed according to English law, and that *N* of London should be agent of *X*, "on whom any writ or other legal process arising out of the "contract might be served." *X* refuses to accept copper, or to pay for the same. *A* brings action for breach of contract. Writ served on *N*. The Court has jurisdiction.<sup>2</sup>

4. *X* is a Russian subject, residing at Odessa, but carrying on business in London. Action by *A* and *B*, a London firm, for the delivery of certain goods to *A* and *B* by *X*, and for an injunction to restrain *X* from dealing with goods. *X* is not in England. Leave is obtained *ex parte* for service of writ on *N*, *X*'s solicitor. *X* appears by counsel and files affidavits, and the case is argued on its merits; objection is then taken against order allowing substituted service. The Court has jurisdiction.<sup>3</sup>

<sup>1</sup> See *Yorkshire Tannery v. Eglinton Co.* (1884), 54 L. J. Ch. 81.

<sup>2</sup> *Tharsis Sulphur Co. v. La Société des Métaux* (1889), 58 L. J. Q. B. D. 435. Note that the jurisdiction arises from the contract, and is independent of the Rules of Court contained in Ord. XI. r. 1. Contrast *British Wagon Co. v. Gray*, [1896] 1 Q. B. (C. A.) 35.

<sup>3</sup> *Boyle v. Sacker* (1888), 39 Ch. D. (C. A.) 249. The ground of jurisdiction is that the defendant, having appeared and argued the case on the merits, cannot then take objection to the service.

5. Action by *A* and *B*, owners of British ship the *Kildona*, against the *Gemma*, a foreign ship, of which *X* and *Y* are owners, for damages caused by collision in the Thames between the *Gemma* and the *Kildona*. *X* and *Y* enter appearance, and the *Gemma* is released on bail. Judgment against *X* and *Y*. Having appeared, they are personally liable to pay the amount of judgment.<sup>1</sup>

6. *W*, a wife, petitions for divorce from *H*, her husband. Neither *W* nor *H* are domiciled in England. *H* appears absolutely and not under protest, and obtains further time to make an answer. The Court has no jurisdiction to grant a divorce.<sup>2</sup>

(ii) *In Respect of Subject-Matter.*

RULE 43.<sup>3</sup>—The Court has jurisdiction to entertain proceedings for the determination of any right over, or in respect of,

(1) any immovable,

(2) any movable,

situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the Court in particular kinds of action or proceedings.

Comment.

This Rule is of the most general description. All that it asserts is the jurisdiction of the Court in respect of all property, whether immovable or movable, situate in England. How far, if at all, the exercise of this authority is restricted by the Rules governing the jurisdiction of the Court in any particular kind of action, *e.g.*, an action *in personam* or an action *in rem*, must be gathered from such Rules.<sup>4</sup>

The jurisdiction of the Court as regards English immovables, *e.g.*, land or houses, is, as contrasted with the jurisdiction of any

<sup>1</sup> *The Gemma*, [1899] P. 285.

<sup>2</sup> *Armitage v. Att.-Gen.*, [1906] P. 135; *Sinclair's Divorce Bill*, [1897] A. C. 469.

<sup>3</sup> Territorial jurisdiction "exists always as to land within the territory, and it may be exercised over movables within the territory." *Sirdar Gurdial Singh v. Rujah of Faridkote*, [1894] A. C. 670, 683, *per curiam*.

<sup>4</sup> See chaps. v. to ix., Rules 45—65, *post*.



foreign<sup>1</sup> Court, exclusive.<sup>2</sup> Our Rule applies (*inter alia*) to any question as to the title to English land, whether it be freehold or leasehold (and therefore personal property<sup>3</sup>), under a will or under an intestacy: such a question must be determinable by the High Court, and cannot be determined by any foreign Court.

The jurisdiction of the Court as regards movables, *i.e.*, goods or choses in action, in England, is, as compared with the jurisdiction of foreign Courts, not exclusive. There are many cases in which the title to movables, even when situate in England, may be decided either by the High Court or by a foreign Court; thus the right to succeed to the movables in England of a person who has died domiciled in France may be decided either by the High Court or by the French Courts. The decision, indeed, belongs preferably to the French Courts, and when given by a French Court will in general be held conclusive by our Courts.<sup>4</sup>

#### Illustrations.

1. *T*, a Frenchman domiciled in France, dies intestate leaving leasehold property in England. The Court has exclusive jurisdiction to determine whether *A*, *T*'s heir under the law of France, is or is not entitled to succeed to the leaseholds.<sup>5</sup>

2. *T*, an Englishman domiciled in France, dies intestate leaving money and stock-in-trade in England. The Court has jurisdiction to determine whether *A*, *T*'s son, is or is not entitled to succeed to money and stock-in-trade.<sup>6</sup> But the French Courts have also jurisdiction to decide the matter.<sup>7</sup>

RULE 44.—Subject to Rules 38 to 40, the Court exercises—

#### (1) Jurisdiction in actions *in personam* ;<sup>8</sup>

<sup>1</sup> The Rules in this Digest have, it must constantly be borne in mind, nothing to do with the relative jurisdiction of the High Court and other English Courts.

<sup>2</sup> See, as to Principle of Effectiveness, Intro., General Principle No. III., p. 40, *ante*.

<sup>3</sup> As to real property and personal property, see pp. 75—77, *ante*.

<sup>4</sup> See Rules 65 and 90, *post*, and *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 502, 503, language of Lord Selborne; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

<sup>5</sup> See Rule 141, *post*, as to the question being determinable by the *lex situs*.

<sup>6</sup> *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402.

<sup>7</sup> See Rules 90, 108, and 182, *post*, as to the decision being governed by the *lex domicilii* of *T*, *i.e.*, by the law of France.

<sup>8</sup> See chap. v., Rules 45, 46, pp. 217, 222, *post*.

- (2) Admiralty jurisdiction *in rem* ;<sup>1</sup>
- (3) Divorce jurisdiction, and jurisdiction in relation to validity of marriage and to legitimacy ;<sup>2</sup>
- (4) Jurisdiction in bankruptcy ;<sup>3</sup>
- (5) Jurisdiction in matters of administration and succession ;<sup>4</sup>

to the extent, and subject to the limitations, hereinafter stated in the Rules<sup>5</sup> having reference to each kind of jurisdiction.

<sup>1</sup> See chap. vi., Rule 47, p. 251, *post*.

<sup>2</sup> See chap. vii., Rules 48 to 52, pp. 256—271, *post*.

<sup>3</sup> See chap. viii., Rules 53 to 61, pp. 277—300, *post*.

<sup>4</sup> See chap. ix., Rules 62 to 65, pp. 303—318, *post*.

<sup>5</sup> Including, of course, the Exceptions thereto.

## CHAPTER V.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 45.<sup>1</sup>—When the defendant in an action *in personam* is, at the time for the service of the writ, in England,<sup>2</sup> the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises.

## Comment.

That this Rule may apply, two conditions must be fulfilled.

*First. The action must be an action in personam.*

An action *in personam* may be defined positively, though perhaps for the purpose of this Digest a little too narrowly, as an action against a person with a view to enforce the doing by him of some particular thing, *e.g.*, the payment of damages for a breach of contract or for a tort; under this head come *inter alia* every common-law action, whether on contract or for tort, and also every equitable proceeding, the object of which is to compel the doing or the not doing of a particular thing, as, *e.g.*, the specific performance of a contract. An action *in personam* may be negatively, and, for the purpose of this Digest, somewhat more extensively described as any action which is not an admiralty action *in rem*, a probate action, or an administration action.<sup>3</sup>

It may be well, though hardly necessary, to add that an action

<sup>1</sup> Westlake, pp. 232—246; Story, chap. xiv.; Foote, pp. 342—357, 483—487; *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509, 510; *Jackson v. Spittall* (1870), L. R. 5 C. P. 542, 549; and American cases, *Peabody v. Hamilton*, 106 Mass. 217; *Roberts v. Knights*, 7 Allen (Mass.), 449. Compare *Fry v. Moore* (1889), 23 Q. B. D. (C. A.) 395. As to power of Court to stay an action, see *Logan v. Bank of Scotland*, [1906] 1 K. B. (C. A.) 141.

<sup>2</sup> See as to meaning of "England," p. 71, *ante*.

<sup>3</sup> Compare Rule 65, and comment thereon, p. 318, *post*.

*in personam* does not include any proceeding which is not in strictness an "action" at all, such as a proceeding for divorce, or for a declaration of nullity of marriage or of legitimacy, or a proceeding in bankruptcy.

*Secondly. At the time for the service of the writ, the defendant must be in England.*

Every action in the High Court now commences with the issue of a writ of summons,<sup>1</sup> which is in effect a written command from the Crown to the defendant to enter an appearance in the action; and the service of the writ, or something equivalent thereto,<sup>2</sup> is absolutely essential as the foundation of the Court's jurisdiction. Where a writ cannot legally be served upon a defendant, the Court can exercise no jurisdiction over him. In an action *in personam* the converse of this statement holds good, and wherever a defendant can be legally served with a writ, there the Court, on service being effected, has jurisdiction to entertain an action against him. Hence, in an action *in personam*, the rules as to the legal service of a writ define the limits of the Court's jurisdiction.<sup>3</sup> Now, a defendant who is in England can always, on the plaintiff's taking proper steps, be legally served with a writ. The service should be personal, but if personal service cannot be effected, the Court may allow substituted or other service.<sup>4</sup> In other words, the Court has jurisdiction to entertain an action *in personam* against any defendant who is in England at the time for the service of the writ.

A foreign corporation, though having its head office abroad, is present in England and liable to be served with a writ there<sup>5</sup> if it has an office or any place in England where its business is carried on through its agent, and this is so though the place does not amount to an office, *e.g.*, is a stand at the Crystal Palace and the

<sup>1</sup> See R. S. C., Ord. I. r. 1.

<sup>2</sup> *E.g.*, an undertaking in writing to accept service, and the entering of an appearance under Ord. IX. r. 1, which is itself a mere illustration of Rule 42, p. 211, *ante*, as to the effect of submission. See further, as to service of writ, Ords. IX., X., and XI.

<sup>3</sup> See *Heinemann v. Hale*, [1891] 2 Q. B. 83, 86, 87, judgment of Cave, J. This is not so in all actions. In a probate action, for example, it is always possible, with the leave of the Court, to effect service on a defendant (Ord. XI. r. 3), but the Court may nevertheless not have jurisdiction. So in a proceeding for divorce, which, though not an action, partakes in some respects of the nature of an action, service of a petition or citation is not decisive of the Court's jurisdiction, which depends at bottom on the domicile of the parties. See Rules 48, 49, pp. 256—261, *post*.

<sup>4</sup> See Ord. IX. r. 2.

<sup>5</sup> Under Ord. IX. r. 8.

business is carried on merely for a limited time.<sup>1</sup> From the fact that any person who is in England is liable to be served with a writ, and that a foreign corporation can be present in England only through its agents, it follows that a corporation may be treated for the purpose of service of a writ as present in England where an ordinary individual could not be so treated, or, in other words, that the Court can exercise jurisdiction over a foreign corporation where it could not exercise jurisdiction over an individual residing out of England. Thus *X & Co.*, a corporation residing in Paris where its business is carried on, does for a few days occupy a stand at the Crystal Palace, where *N*, their agent, explains the working of the articles offered there for sale. *X & Co.* is, whilst the business is so carried on, present in England and liable to be served with a writ there. But *Y*, a Frenchman living in France, where he carries on business, pursues exactly the same course as the corporation, that is, he does not come to England, but he employs an agent for a few days to occupy a stand at the Crystal Palace and sell *Y*'s goods there. He cannot be served with a writ there, and in action service must be made upon him, if at all, as upon a defendant out of England.<sup>2</sup>

If the conditions laid down in Rule 45 are fulfilled, the Court has the most extensive jurisdiction in respect of causes of action of every kind. Hence our tribunals have been said "to be more open to admit actions founded upon foreign transactions than those of any other European country."<sup>3</sup> They in general exercise, as already pointed out, no jurisdiction with respect to matters relating to foreign land.<sup>4</sup> But, "so far as relates to the question of jurisdiction, we apprehend," it has been laid down, "that the superior Courts of England did not decline jurisdiction in the case of any transitory cause of action, whether between British subjects or foreigners, resident at home or abroad, or whether any or every fact necessary to be proved, in order to

<sup>1</sup> *La Bourgogne*, [1899] A. C. 431, and *Dunlop Pneumatic Tyre Co. v. Action-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K. B. (C. A.) 342.

<sup>2</sup> *I.e.*, under Ord. XI. r. 1, or Exceptions 1—7 to Rule 46, pp. 225—243, *post*. If in the case of *La Bourgogne*, [1899] A. C. 431, the ship had been owned by a private owner resident in France instead of by a French corporation it would, *semble*, have been impossible to serve a writ upon the owner.

<sup>3</sup> *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28, *per curiam*. Compare *Western Bank v. Perez*, [1891] 1 Q. B. (C. A.) 304, 309, 311, judgment of Esher, M. R., pp. 316, 317; judgment of Bowen, L. J.

<sup>4</sup> See Rule 39, p. 201, *ante*.

“ establish either the plaintiff’s or the defendant’s case, arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the Courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him where present in England; ”<sup>1</sup> and what was true of the Superior Courts in 1870 holds good now of the High Court.

### Illustrations.

1. *X* incurs a debt to *A* in France. *A* brings an action against *X*<sup>2</sup> for the debt. The Court has jurisdiction to entertain the action.<sup>3</sup>

2. *X* executes at Calcutta a bond in favour of *A*. *A* brings an action against *X* on the bond. The Court has jurisdiction.<sup>4</sup>

3. *X*, a Frenchman, makes a contract in France with *A* for the delivery of goods by *X* to *A* in Paris. *A* brings an action against *X* for not delivering the goods. The Court has jurisdiction.<sup>5</sup>

4. *A* has brought an action in France against *X*, a French citizen residing in France, for a debt incurred there by *X* to *A*, and has obtained a judgment against *X*. *A* brings an action against *X* on the judgment. The Court has jurisdiction.<sup>6</sup>

5. *X* assaults *A* in France. *A* brings an action against *X* for the assault. The Court has jurisdiction.<sup>7</sup>

6. *X* in Jamaica wrongfully imprisons *A*. *A* brings an action for false imprisonment against *X*. The Court has jurisdiction.<sup>8</sup>

7. *A* & *B* are an English company owning a submarine telegraph between England and France. *X* is a Swedish subject, the owner of a Swedish ship. *X*’s ship, through the negligence of the captain and sailors, strikes against and injures the telegraphic cable. The damage is done on the high seas, more than three

<sup>1</sup> *Jackson v. Spittall* (1870), L. R. 5 C. P. 542, 549.

<sup>2</sup> In all these illustrations to Rule 45, it is of course assumed that *X* is in England at the time for the service of the writ.

<sup>3</sup> *De la Vega v. Vianna* (1830), 1 B. & Ad. 284.

<sup>4</sup> *Alliance Bank of Sumla v. Carey* (1880), 5 C. P. D. 429.

<sup>5</sup> Compare *Roberts v. Knights*, 7 Allen, 449 (Am.).

<sup>6</sup> Compare *Godard v. Gray* (1870), L. R. 6 Q. B. 139, and *Schrsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

<sup>7</sup> *Scott v. Seymour* (1862), 1 H. & C. 219; 31 L. J. Ex. 457; 32 L. J. Ex. 61.

<sup>8</sup> *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870) L. R. 6 Q. B. 1.

miles from land. *A* brings an action against *X* to obtain compensation for the damage. The Court has jurisdiction.<sup>1</sup>

8. *X* & *Y* are Spanish subjects, the owners of a Spanish ship, which on the high seas comes into collision with a British ship belonging to *A*, a British subject. *A* brings an action against *X* & *Y* for damage caused to the ship. The Court has jurisdiction.<sup>2</sup>

9. *X*, an Italian subject carrying on business in England, is owner of an Italian ship. *X*'s ship comes on the high seas into collision with a British ship, and causes the death of *M*, one of the crew of such ship. *A*, the representative of *M*, brings an action against *X* to recover damages for the death of *M*. The Court has jurisdiction (?).<sup>3</sup>

10. *X* & *Y* are British subjects, and the owners of a British ship. The ship, when on the high seas, comes into collision, through the negligence of her crew, with a Norwegian ship, and thereby causes the death of *M*, a Norwegian seaman, on board the Norwegian ship. *A*, the representative of *M*, brings an action, under the Fatal Accidents Acts, 1846 and 1864, against *X* & *Y* for damages. The Court has jurisdiction.<sup>4</sup>

11. The *Atjeh*, a Dutch ship, comes into collision on the high seas with the *Kroon-Prins*, another Dutch ship, through the negligence of the crew of the *Atjeh*. The owner of the *Atjeh*, *X*, is in England. *A*, the owner of the *Kroon-Prins*, brings an

<sup>1</sup> *Submarine Telegraph Co. v. Dickson* (1864), 15 C. B. N. S. 759; 33 L. J. C. P. 139.

<sup>2</sup> Compare *The Chartered Bank of India v. Netherlands Navigation Co.* (1883), 10 Q. B. D. (C. A.) 521; *The Leon* (1881), 6 P. D. 148; *Re Smith* (1876), 1 P. D. 300. In the last case the action, it is true, could not be maintained, but this was owing to the impossibility of effecting service on the defendants in England.

<sup>3</sup> See *The Guldfaxe* (1868), L. R. 2 A. & E. 325; *The Beta* (1869), L. R. 2 P. C. 447; *The Explorer* (1870), L. R. 3 A. & E. 289. Compare, however, *The Franconia* (1877), 2 P. D. (C. A.) 163, with *Harris v. Owners of Franconia* (1877), 2 C. P. D. 173, and *Seward v. Vera Cruz* (1884), 10 App. Cas. 59.

"It is not necessary to decide whether—assuming, of course, that no technical difficulty arises as to the service of proceedings—the action could be maintained in the English Courts, the death occurring through negligence in a collision upon the high seas, where both parties were foreigners, or where the wrongdoers were foreigners and the sufferers English. My present opinion is that an action could be maintained, but I desire to be understood as not expressing, as it is not necessary to express, a decided opinion upon this point. Here the plaintiff seeks to enforce her claim against an English subject, and I cannot see why she should not do so." *Davidsson v. Hill*, [1901] 2 K. B. 606, 614, 615, judgment of Kennedy, J.

<sup>4</sup> *Davidsson v. Hill*, [1901] 2 K. B. 606; *The Explorer* (1870), L. R. 3 A. & E. 289; *Adam v. British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, not followed.

action against *X* for the damage done by the *Atjeh* to the *Kroon-Prins*. The Court has jurisdiction.<sup>1</sup>

12. A steamer belonging to *A* renders salvage services to a ship on the high seas belonging to *X* and *Y*. *A* brings an action *in personam* against *X* and *Y* for the services rendered. The Court has jurisdiction.<sup>2</sup>

13. *A*, an American citizen, brings an action against *X*, an American citizen, for a libel published by *X* of *A* in New York. The Court has jurisdiction.<sup>3</sup>

RULE 46.<sup>4</sup>—When the defendant in an action *in personam* is, at the time for the service<sup>5</sup> of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action.

#### Comment.

When it is not legally allowable to serve a defendant with a writ, the Court (as already pointed out)<sup>6</sup> has no jurisdiction to

<sup>1</sup> See *The Chartered Bank of India v. Netherlands Navigation Co.* (1883), 10 Q. B. D. (C. A.) 521, especially judgment of Brett, L. J., 536, 537; *The Leon* (1881), 6 P. D. 148.

<sup>2</sup> *The Elton*, [1891] P. 265.

<sup>3</sup> See *Field v. Bennett* (1886), 56 L. J. Q. B. D. 89. In this case the defendant, Bennett, was not in England. If he had been, there would have been no difficulty in maintaining an action against him for a libel, whether published in England or the United States. See Rules 177—179, pp. 645—647, *post*.

<sup>4</sup> See, e.g., *In re Busfield* (1886), 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.; *Jackson v. Spittall* (1870), L. R. 5 C. P. 542; R. S. C. Ord. XI. r. 1, *In re Eager* (1882), 22 Ch. D. (C. A.) 86.

<sup>5</sup> When a writ for service in England has been issued against a defendant, who (being a British subject) is, at the time of the *issue*, in England, and the defendant after the writ has come to his knowledge has, before due service of the writ, left England, though not, it may be, for the purpose of avoiding service, the Court may (*seemle*) make an order for substituted service of the writ under Ord. IX. r. 2, provided that the circumstances of the case show that it would be just to make such an order. *Jay v. Budd*, [1898] 1 Q. B. (C. A.) 12, 15, 18; and compare *Western Suburban & Notting Hill Building Society v. Rucklidge*, [1905] 2 Ch. 472. If this be so, the Court may, under the conditions mentioned, in effect exercise jurisdiction over a defendant who is in England at the time of the issue of the writ, as though he were in England at the time of the service of the writ. But the circumstances of *Jay v. Budd* are very peculiar, and the power to allow service on a defendant out of England otherwise than under Ord. XI. r. 1, or Ord. XLVIII. r. 1, *i.e.*, under the Exceptions to Rule 46, is open to some doubt. See *Wilding v. Bean*, [1891] 1 Q. B. (C. A.) 100; *Fry v. Moore* (1889), 23 Q. B. D. (C. A.) 395, 397, 399, judgments of Lindley and Lopes, L. JJ.; *Field v. Bennett* (1886), 56 L. J. Q. B. 89; *Hillyard v. Smith* (1887), 36 W. R. 7.

<sup>6</sup> See p. 218, *ante*.



entertain an action against him ; every restriction, therefore, on the legal possibility of serving a defendant with a writ, is in substance a restriction on the Court's jurisdiction, and is treated as such in this work.

But at common law<sup>1</sup> a writ could never be served on a defendant when out of England,<sup>2</sup> and in an action *in personam* this common-law doctrine is still (subject to definite though wide exceptions) maintained ; or, in other words, the Court has, as a rule, no jurisdiction to entertain an action *in personam* against a defendant who, at the time for service of the writ, is in a foreign country.

This common-law principle has been modified by Rules of Court<sup>3</sup> made under statutory authority by the judges, and in very many actions (perhaps, numerically, in the majority of actions) service<sup>4</sup> can be effected on, *i.e.*, the Court exerts jurisdiction over, a defendant who is out of England ; these cases form the eight Exceptions to our Rule. The Rule and the Exceptions, taken together, constitute, what has hitherto hardly existed, a body of principles defining, in actions *in personam*, the extra-territorial jurisdiction of the Court.

As to the general character of these Exceptions, the following points should be noted.

*First.* They all arise under Rules of Court, and all but Exception 8<sup>5</sup> arise under Rules of Court, 1883, Ord. XI. r. 1.

*Secondly.* The Exceptions are exhaustive ; they are intended to embody the effect on the jurisdiction of the Court of all the Rules of Court having reference to service in an action *in personam* on a defendant who is out of England ;<sup>6</sup> and such Rules of Court are themselves exhaustive, the, practice of the Courts,

<sup>1</sup> See as to proceedings by means of outlawry and distringas, *Jackson v. Spittall* (1870), L. R. 5 C. P. 542 ; 3 Blackstone, pp. 280 and xvii. ; First Report of Commissioners for Inquiring into the Process, &c. of the Superior Courts of Common Law (1851), pp. 4—7 ; and compare 2 Spence, Jurisdiction of the Courts of Chancery, p. 7, note (a), for service of writs of subpoena in suits instituted here on parties living out of England, and General Orders of 8th May, 1845, Order 32.

<sup>2</sup> See *In re Busfield* (1886), 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.

<sup>3</sup> See especially, R. S. C. Ord. XI. r. 1.

<sup>4</sup> The service may be service of the notice of a writ. "When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him." Ord. XI. r. 6. But for our present purpose service of notice is equivalent to service of a writ.

<sup>5</sup> This Exception arises under Ord. XLVIII. r. 1.

<sup>6</sup> Compare, however, note 5, p. 222, *ante*, as to substituted service on defendant out of England, and note at end of this chapter, as to Third Party Procedure.

the jurisdiction whereof is transferred to the High Court, being, except where it is expressly kept alive,<sup>1</sup> obsolete.<sup>2</sup>

*Thirdly.* There is an essential difference between the jurisdiction exercised by the Court when the defendant in an action is in England and the jurisdiction exercised by the Court when the defendant is not in England, *i.e.*, when an action comes within the Exceptions to Rule 46. When the defendant is in England, the jurisdiction of the Court is not discretionary;<sup>3</sup> the plaintiff has a right to demand<sup>4</sup> that if it exist it shall be exercised. When the defendant is not in England, the jurisdiction of the Court is to a certain extent discretionary, for the Court may, if it see fit, in general<sup>5</sup> decline to allow the service<sup>6</sup> or even the issue of the writ,<sup>7</sup> and thus decline to exercise its jurisdiction.<sup>8</sup>

*Fourthly.* An action may fall at the same time within more than one of these Exceptions.<sup>9</sup> Thus an action for the breach of a contract to be performed in England falls within Exception 5, but if the contract be a contract affecting land in England, the action falls also within Exception 2. This may be a matter of consequence, since under Exception 2 the jurisdiction of the Court is not, whilst under Exception 5 the jurisdiction of the Court is, affected by the Scotch or Irish domicile or residence of the defendant.

<sup>1</sup> See, *e.g.*, as to divorce, Ord. LXVIII. r. 1 (d).

<sup>2</sup> *In re Busfield* (1886), 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.; *In re Eager* (1882), 22 Ch. D. (C. A.) 86; *Cresswell v. Parker* (1879), 11 Ch. D. (C. A.) 601, 603, judgment of James, L. J.

<sup>3</sup> At any rate, where personal service can be effected. As to substituted service, see R. S. C. Ord. IX. r. 2.

<sup>4</sup> Subject, however, to the right of the Court to stay an action where the not staying it would work injustice. See *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141; and chap. x., *post*.

<sup>5</sup> But note that the jurisdiction of the Court is not discretionary in cases falling under Exception 8. See p. 247, *post*.

<sup>6</sup> Ord. XI. r. 1.

<sup>7</sup> Ord. II. r. 4. Conf. *The W. A. Sholten* (1887), 13 P. D. 8.

<sup>8</sup> *Great Australian Co. v. Martin* (1877), 5 Ch. D. (C. A.) 1 (decided under R. S. C. 1875); *Société Générale de Paris v. Dreyfus Bros.* (1887), 37 Ch. D. (C. A.) 215, especially judgment of Lindley, L. J., pp. 224, 225. Compare *Call v. Oppenheim* (1885), 1 Times L. R. 622. See also R. S. C. Ord. XI. r. 2, as to the mode in which the discretion of the Court is to be exercised when leave is asked to serve a writ in Scotland or in Ireland. *Woods v. McInnes* (1878), 4 C. P. D. 67; *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142; *Ex parte McPhail* (1879), 12 Ch. D. 632; *Tottenham v. Barry* (1879), 12 Ch. D. 797; *Murshall v. Marshall* (1888), 38 Ch. D. (C. A.) 330; *Kinahan v. Kinahan* (1890), 45 Ch. D. 78; *In re Burland's Trade Mark* (1889), 41 Ch. D. 542.

<sup>9</sup> *Tassell v. Hallen*, [1892] 1 Q. B. 321, 323—325, judgment of Coleridge, C. J.

## Illustrations.

1. *X* incurs a debt to *A* at Paris for goods delivered to *X* and to be paid for by *X* in Paris. *X* is in Paris. *A* brings an action against *X*. The Court has no jurisdiction to entertain the action.

2. *X* publishes in England a libel of *A* who is resident in England. *X* is in France. *A* brings an action against *X* for the libel. The Court has no jurisdiction.<sup>1</sup>

3. *X* enters into a contract in England with *A* for the carriage of goods by *X* for *A* from Havre to the Mauritius. *X* is in Paris. *A* brings an action against *X* for non-delivery of the goods. The Court has no jurisdiction.<sup>2</sup>

4. *X*, an Englishman, once domiciled and ordinarily resident in England, has acquired a domicile and ordinary residence in France. He incurs at Paris a debt to *A*, payable in France, and also assaults *A* in Paris. *X* is in France. *A* brings an action against *X* for the debt and for the assault. The Court has no jurisdiction.<sup>3</sup>

*Exception 1.*<sup>4</sup>—The Court has jurisdiction to entertain an action against a defendant who is not in England, whenever the whole subject-matter of the action is land situate in England (with or without rents or profits).

## Comment and Illustrations.

This Exception applies where the whole subject-matter of the action is land in England.

1. *A* brings an action against *X* for the recovery of land in

<sup>1</sup> *De Bernales v. Bennett* (1894), 10 Times L. R. 419; *De Bernales v. New York Herald*, [1893] 2 Q. B. (C. A.) 97 (n.)

<sup>2</sup> Note that the contract is not to be performed in England, nor is it broken in England, and therefore does not fall within Exception 4.

<sup>3</sup> This case does not fall within Exception 3, as to which see p. 229, *post*. The fact that *X* was once domiciled or ordinarily resident in England does not give the Court jurisdiction.

<sup>4</sup> R. S. C. Ord. XI. r. 1 (a). The first seven Exceptions to this Rule correspond with, and with slight verbal alterations reproduce, the seven cases (a) to (g) in which, under Ord. XI. r. 1, "service out of the jurisdiction [*i.e.*, out of England] " of a writ of summons, or notice of a writ of summons, may be allowed by the " Court or a judge." R. S. C. Ord. XI. r. 1. See App., Note 10, "Service of Writ out of England."

Middlesex (ejectment). *X* is in France. The Court has jurisdiction.

2. *A* brings an action against *X* for the recovery of land in Middlesex, and for mesne profits. The Court has jurisdiction.<sup>1</sup>

*Exception 2.*<sup>2</sup>—The Court has jurisdiction<sup>3</sup> whenever any act, deed [will<sup>4</sup>], contract, obligation, or liability affecting land or hereditaments situate in England is sought to be construed, rectified, set aside, or enforced in the action.

#### Comment.

This Exception applies to any action in respect of any matter affecting English land.

The terms, however, of the Exception give rise to more than one difficulty.

When, for example, does a contract, obligation, or liability “affect land”? It has been held, on the one hand, that an action by an outgoing tenant of a farm in Yorkshire to recover from his landlord compensation for tenant right, according to the custom of the country, was an action in which a contract, obligation, or liability “affecting” land was sought to be enforced, and that the action was therefore within Exception 2.<sup>5</sup> It has been held, on the other hand, that an action to recover rent due on a lease of land in England was not an action to enforce a contract, obligation, or liability “affecting” land, and that the action, therefore, was not within Exception 2,<sup>6</sup> and the law was in this instance thus laid down :—

<sup>1</sup> See *Agnew v. Usher* (1884), 14 Q. B. D. 78, 79, language of Lord Coleridge, C. J.

<sup>2</sup> Ord. XI. r. 1 (b).

<sup>3</sup> Viz., to entertain an action against a defendant who is not in England. In the illustrations to all these Exceptions it is assumed that the defendant is not in England. If he were in England, Rule 46 would have no application. See Rule 45, p. 217, *ante*.

<sup>4</sup> This apparently refers to an administration action. See Rule 64, *post*, and comment thereon.

<sup>5</sup> *Kaye v. Sutherland* (1887), 20 Q. B. D. 147.

<sup>6</sup> *Agnew v. Usher* (1884), 14 Q. B. D. 78. So held by Q. B. D.; but the judgment of the Q. B. D. setting aside the service of a writ on the defendant, though affirmed by the Court of Appeal, was affirmed on grounds which made it unnecessary to decide whether the contract or obligation affected land. See 51 L. T. N. S. 752 (C. A.).

"I think the more reasonable construction of [Exception 2] is "to limit it to any legal proceedings—to use the largest and most "vague term—in which English land is, according to the words "of [Exception 2], to be affected. There, as the thing to be "affected is in English jurisdiction and is not in Scotch jurisdiction, recourse should be had to the English forum. I do not "pretend to give a complete or exhaustive account of all the "possible proceedings 'affecting land' which are probably within "[Exception 2]; but, according to the ordinary rules of construction and legal phraseology, an action to obtain payment of rent "certainly is not an action to enforce any 'act, deed, or will,' "and I do not think it is to enforce any 'contract, obligation, or "liability affecting land within the jurisdiction.'"<sup>1</sup> But it has been said that the judgment from which this quotation is taken amounted to no more "than that the action was brought for money "due, and should be brought as a personal action in the forum of "the defendant,"<sup>2</sup> and that "the decision of the Court only came "to this, that an action against the assignee of a lease for rent due "was not within"<sup>3</sup> Exception 2.<sup>4</sup>

It is therefore impossible to lay down with any precision what are the cases in which land is "affected" within the terms of Exception 2. Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, within sect. 4 of the Statute of Frauds, it may be assumed, affects lands; and an action to enforce such contract or sale, assuming the land to be in England, comes within Exception 2.

What, again, is the exact meaning of the terms "enforced in an action"? The suggestion has been made that they were intended to limit Exception 2 to actions for specific performance. "As I "read those words, 'sought to be enforced in the action,'" says A. L. Smith, J., "they seem to mean 'specifically performed.'"<sup>5</sup> But this suggestion cannot, it is conceived, be accepted as sound. "I should hesitate," it has been said by Mr. Justice Charles, "to "narrow the operation of [Exception 2] by holding that it only "applied where specific performance of some contract or obligation "was sought."<sup>6</sup>

<sup>1</sup> *Agnew v. Usher* (1884), 14 Q. B. D. 78, 80, judgment of Coleridge, C. J.

<sup>2</sup> *Kaye v. Sutherland* (1887), 20 Q. B. D. 147, 151, judgment of Charles, J.  
See *Tassell v. Hallen*, [1892] 1 Q. B. 321.

<sup>3</sup> *Ibid.*

<sup>4</sup> *I.e.*, of Rules of Court, 1883, Ord. XI. r. 1 (b).

<sup>5</sup> *Agnew v. Usher* (1884), 14 Q. B. D. 78, 81, judgment of A. L. Smith, J.

<sup>6</sup> *Kaye v. Sutherland* (1887), 20 Q. B. D. 147, 151.

## Illustrations.

1. *A* is an outgoing tenant of a farm in Yorkshire, of which *X* is landlord. *X* resides in Scotland. *A* brings an action against *X* to recover compensation for tenant right, according to the custom of the country. The Court has jurisdiction.<sup>1</sup>

2. *A* brings an action against *X* for breach of a contract to give up the possession of a house in London to *A*.<sup>2</sup> *Semble*, the Court has jurisdiction.

3. *A* brings an action against *X* for breach of a contract for sale of a business, as a brickyard, accompanied with possession of the premises where it is carried on.<sup>3</sup> *Semble*, the Court has jurisdiction.

4. *A* brings an action against *X* for the breach of a contract for the sale of a growing crop of grass, being a natural and permanent crop not within the description of emblements or *fructus industriales*.<sup>4</sup> *Semble*, the Court has jurisdiction.<sup>5</sup>

5. *A* brings an action against *X* to enforce specific performance of a contract for the sale by *X* to *A*, or for the lease by *X* to *A*, of a house in London. The Court has jurisdiction.

6. *A* brings an action against *X* for the rectification of a contract for the sale by *A* to *X* of land in Middlesex. The Court has jurisdiction.

7. *A* brings an action against *X*, the assignee of a lease of a house in Middlesex, for breach of covenant to repair. *X* is resident in Scotland. The action is one in which a contract or liability affecting land in England is sought to be enforced. The Court has jurisdiction.<sup>6</sup>

8. *A* brings an action against *X*, domiciled in Scotland, for one quarter's rent of a house at Liverpool, held under a lease for ten years. *A* claims the rent from *X* as assignee of the lease. *X* alleges that the assignment was to secure a debt, and that he

<sup>1</sup> *Kaye v. Sutherland* (1887), 20 Q. B. D. 147, compared with *Agnew v. Usher* (1884), 14 Q. B. D. 78; 51 L. T. N. S. 576 (C. A.) 752.

<sup>2</sup> *Kelly v. Webster* (1852), 12 C. B. 283; 21 L. J. C. P. 163.

<sup>3</sup> *Smart v. Harding* (1855), 15 C. B. 652; 24 L. J. C. P. 76.

<sup>4</sup> *Crosby v. Wadsworth* (1805), 6 East, 602; 8 R. R. 566; *Carrington v. Roots* (1837), 2 M. & W. 248.

<sup>5</sup> These last three illustrations are merely examples of actions on contracts within the fourth section of the Statute of Frauds, and therefore (it is submitted) within Exception 2.

<sup>6</sup> *Tassell v. Hallen*, [1892] 1 Q. B. 321.

never signed or accepted the assignment, or entered into possession. The Court has (*semble*) no jurisdiction under this Exception.<sup>1</sup>

9. *X* in Ireland makes a statement, in the nature of slander of title, in respect of land owned by *A* in England. *A* brings an action against *X*. The Court has no jurisdiction.<sup>2</sup>

*Exception 3.*<sup>3</sup>—The Court has jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England.

#### Comment.

The extent of this Exception depends upon the meaning of the term “relief.” It might conceivably be used as meaning such relief as, before the Judicature Act came into operation, was obtainable in a Court of equity, and was not obtainable at common law. It is, however, apparently used in the widest sense, and includes the recovery of a debt, or of damages in an action for breach of contract or tort.<sup>4</sup> If this be so, the expression “whenever any relief is sought” is almost equivalent to “whenever any action is brought.” Hence domicil or ordinary residence in England is of itself a ground of jurisdiction against a defendant who might otherwise, on account of his absence from England, be exempt from the jurisdiction of the Court.<sup>5</sup>

The expression “domiciled or ordinarily resident” recurs in Exception 5, and also, in a slightly different form, in Rule 55, *post*.<sup>6</sup>

<sup>1</sup> *Agnew v. Usher* (1884), 14 Q. B. D 78, affirmed 51 L. T. (N. S.) (C. A.) 752.

<sup>2</sup> *Casey v. Arnott* (1876), 2 C. P. D. 24. Where, under the illustrations of a particular Exception, it is stated that “the Court has no jurisdiction,” the meaning is that the Court has not jurisdiction under that particular Exception.

<sup>3</sup> Ord. XI. r. 1 (c).

<sup>4</sup> See *Hadad v. Bruce* (1892), 8 T. L. R. 409, and the very wide meaning given to the term “relief” in the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 16.

<sup>5</sup> In an earlier edition it was argued that the term “relief” in Exception 3 (*i.e.*, Ord. XI. r. 1 (c)) ought to receive a narrower interpretation and be taken to mean such relief as used to be obtainable in a Court of equity and was not obtainable in a Court of common law. But the Court does not appear to have in fact affixed this narrower interpretation to the term “relief.” It should, however, be noticed that if the term “relief” be used in its widest and popular sense, the Exception under consideration (Ord. XI. r. 1 (c)) may certainly, in many cases, immensely widen the jurisdiction of the Court. See Illustrations, p. 231, *post*.

<sup>6</sup> Rule 55, p. 283, is grounded on the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d), and, to a great extent, defines the limits of the Court’s jurisdiction in matters of bankruptcy.

It is of importance, therefore, to note the distinction between "domicil"<sup>1</sup> and "residence;"<sup>2</sup> and to bear in mind that the words "domicil" and "domiciled," when employed in a Rule of Court or an Act of Parliament, are to be taken in their strict technical sense.<sup>3</sup>

A man's domicil is the country which is considered by law to be his permanent home.<sup>4</sup> What is a man's domicil is, therefore, a matter of law to be determined by strictly technical rules.<sup>5</sup> It may be either a domicil of choice<sup>6</sup> or a domicil of origin;<sup>7</sup> hence, under conceivable circumstances, it may happen that the jurisdiction of the Court under Exception 3, as under Exception 5, depends on the answer to the question whether the defendant's father was or was not domiciled in England at the time of the defendant's birth. A man's residence, on the other hand, is the place or country where he in fact is habitually present.<sup>8</sup> Where it is that a man is ordinarily resident is a matter with which legal rules have nothing to do, and which must be ascertained in the same way as any other physical fact. A man, again, may be domiciled in one country, *e.g.*, France, and may be ordinarily resident in another, *e.g.*, England. No man can be domiciled in more countries than one,<sup>9</sup> but there exists at any rate a possibility of a person having an ordinary residence in at least two countries. This would be so if a man were, as a regular habit, to pass half of every year in England and half in France.<sup>10</sup> "Ordinary residence" means something more than mere temporary presence in England, though exactly what amount of presence in England amounts to "ordinary residence" is a matter which scarcely admits of exact definition.<sup>11</sup>

<sup>1</sup> See chap. ii., p. 82, *ante*.

<sup>2</sup> See p. 83, note 1, *ante*.

<sup>3</sup> *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418; *In re Hequard* (1889), 24 Q. B. D. (C. A.) 71.

<sup>4</sup> See definition of "domicil," pp. 68, 72, 82, *ante*.

<sup>5</sup> See Rules 1—18, pp. 82—144, *ante*.

<sup>6</sup> See p. 108, *ante*.

<sup>7</sup> See p. 104, *ante*.

<sup>8</sup> See chap. ii., p. 83, note 1, *ante*.

<sup>9</sup> See Rule 3, p. 98, *ante*.

<sup>10</sup> See *In re Norris* (1888), 4 Times L. R. 452; *Ex parte Hequard* (1889), 24 Q. B. D. (C. A.) 71. Compare R. S. C. 1883, Ord. XI. r. 1 (e), (d), and (e), and Bankruptcy Act, 1883, s. 6, sub-s. 1 (d). Modern legislation exhibits a tendency to base jurisdiction on domicil or ordinary residence. See *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418; *Ex parte Barne* (1886), 16 Q. B. D. (C. A.) 522.

<sup>11</sup> Compare *Ex parte Gutierrez* (1879), 11 Ch. D. (C. A.) 298; *Ex parte Hequard* (1889), 24 Q. B. D. (C. A.) 71.



## Illustrations.

1. *T*, a testator, dies domiciled in Ireland. *X*, *T*'s executor, is domiciled in England, but is residing in Ireland. *A*, a legatee, brings an action against *X* for the improper investment of money received under *T*'s will. The Court has jurisdiction.<sup>1</sup>

2. *A* brings an action against *X* for the rectification of a contract made between *X* and *A*. *X* is domiciled in England, but is in France. The Court has jurisdiction.

3. *X*, an Englishman, domiciled or ordinarily resident in England, makes a promise of marriage to *A*, a Greek woman, born in Syria. *X* goes abroad. *A* brings an action for breach of promise of marriage. The Court has jurisdiction.<sup>2</sup>

4. *X* is domiciled in England. *X* enters into a contract with *A*, to be performed in France. *A* brings an action against *X* for breach of contract. The Court has jurisdiction.<sup>3</sup>

5. *X*'s domicile of origin, which he has never abandoned, is Scotch. He is ordinarily resident in England, where he has a house and carries on business. He is absent in France. He has incurred in England a debt to *A* of 1,000*l*. *A* brings an action for the debt. The Court (*semble*) has jurisdiction.<sup>4</sup>

6. *X*, domiciled or ordinarily resident in England, assaults *A* in France. *A* brings an action for the assault. The Court has jurisdiction.

<sup>1</sup> See *Harvey v. Dougherty* (1887), 56 L. T. 322.

<sup>2</sup> *Hadad v. Bruce* (1892), 8 Times L. R. 409. If this case is rightly decided, the Court certainly can allow the service of a writ, *i.e.*, has jurisdiction. The service was allowed by the Divisional Court, not on the ground that the contract was to be performed in England, *i.e.*, came within Ord. XI. r. 1 (e) (Exception 5), but on the ground that it came within Ord. XI. r. 1 (c) (Exception 3). And on this very ground it was laid down that the judge could not inquire into the existence of *prima facie* evidence of a cause of action. "There was, however, the alternative case of a defendant domiciled or resident within the jurisdiction [*i.e.*, in England], and he thought the judge in such a case was not warranted in inquiring into the cause of action. There was, it appeared, a claim which could be maintained in the Courts of this country against a person ordinarily resident in this country; and on the plaintiff stating that she had a cause of action against such a person, she was entitled, without more, to have a writ of summons for service upon him out of the jurisdiction" (*i.e.*, out of England). *Ibid.*, p. 410, per Cave, J.

<sup>3</sup> Compare *Jones v. Scottish Insurance Co.* (1886), 17 Q. B. D. 421. In that case the action could not be maintained, but the reason was that the defendant was held by the Court not to be ordinarily resident or domiciled in England. See as to domicile of companies, Rule 19, p. 160, *ante*.

<sup>4</sup> In other words, Exception 3 (Ord. XI. r. 1 (c)) does in the circumstances override Exception 5 (Ord. XI. r. 1 (e)). Compare *Jones v. Scottish Insurance Co.* (1886), 17 Q. B. D. 421, where apparently the Court would have allowed service of a

7. X, domiciled in England, assaults A in London. He is in France, where he is ordinarily resident. A brings an action for the assault. The Court has jurisdiction.

*Exception 4.*<sup>1</sup>—The Court has jurisdiction whenever the action is for the execution (as to property situate in England)<sup>2</sup> of the trusts of any written instrument of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England.

#### Comment.

1. The property to which the trust to be executed applies must be “property which is actually situate [in England],<sup>3</sup> and not “simply property which ought to be, or if the trusts were duly “executed would be, so situate.”<sup>4</sup>

2. The property must be situate in England at the time when an application is made to the Court for leave to serve a writ on the defendant out of England.

Referring to Ord. XI. r. 1 (d), on which Exception 4 is grounded, Stirling, J., has said: “The rule does not in terms “define the period at which the property is to be situate [in “England], but, seeing that the rule relates to service, and that

writ against a Scotch company having its chief place of business in Scotland in an action on a contract made in England if it could have been made out that the company was domiciled or ordinarily resident in England.

<sup>1</sup> Ord. XI. r. 1 (d). The part of the Order which refers to an administration action is omitted. This omitted part gives the Court jurisdiction where the defendant is out of England, whenever “the action is for the administration of “the personal estate of any deceased person who at the time of his death was “domiciled within the jurisdiction” (*i.e.*, in England).

<sup>2</sup> As to the extent to which equitable interests in foreign property can exist, see Lewin, *Law of Trusts* (8th ed.), pp. 48—50.

<sup>3</sup> “Situate” means locally situate, and the local situation of personal property must, it is conceived, be in the main decided in accordance with the rules for fixing the situation of personal property for the purpose of testamentary jurisdiction. (See chap. ix., comment on Rule 63, *post*.) Thus a debt, it is submitted, is situate in the country where the debtor resides. But some of the niceties as to the local situation of personal property which originate in the practice of the Ecclesiastical Courts in regard to the grant of administration will not, it is submitted, be applied for determining the situation of property as regards the execution of a trust.

<sup>4</sup> *Winter v. Winter*, [1894] 1 Ch. 421, 423, judgment of Stirling, J.

“ the language with which I am dealing imposes a condition on the fulfilment of which the propriety of the service depends, I think the period to be regarded must be when leave to effect service is given.”<sup>1</sup>

3. The trust must be one which ought to be executed according to the law of England.

### Illustrations.

1. *N* by deed conveys leasehold and freehold property in England to *X* and *Y* in trust, on the death of *N* to sell the same and pay the proceeds to *A* and *B*. *A* and *B* bring an action against *X* and *Y* to have the trust executed. The Court has jurisdiction.

2. *X* is sole trustee of a settlement executed March, 18<sup>56</sup>. Under the trusts of the settlement, *A* is beneficially entitled to a sum of consols. Before 1st May, 1893, *X* sells the consols and leaves England, and has not returned there. There is no other property in England which is subject to the trusts of the settlement. The Court has no jurisdiction<sup>2</sup> to entertain an action by *A* for execution of the trusts of settlement.

3. *X* is sole trustee of a settlement made in Scotland, and to be executed in accordance with the law of Scotland. *A* is, under the settlement, entitled to a share in money which is in England. *X* is in Scotland. The Court has (*semble*) no jurisdiction to entertain an action by *A* for the execution of the trust.

*Exception 5.*<sup>3</sup>—The Court has jurisdiction whenever the action is founded on any breach, or alleged breach, in England, of any contract, wherever made, which, according to the terms thereof, ought to be per-

<sup>1</sup> *Winter v. Winter*, [1894] 1 Ch. 421, 423, judgment of Stirling, J., who adds, however: “ Though, if property were found [in England] when service was actually effected, or, at the latest, when such an application as the present is made [*i.e.*, an application to set aside the order giving the plaintiff liberty to issue the writ for service out of the jurisdiction], the Court may possibly take that circumstance into consideration.” *Ibid.* In other words, the Court may possibly hold that it has jurisdiction over the defendant if property has come into England at a later period in the proceedings than the moment when leave to effect service was given, but before application was made to set aside the writ.

<sup>2</sup> *Winter v. Winter*, [1894] 1 Ch. 421.

<sup>3</sup> Ord. XI. r. 1 (e). The Exception does not apply to an action for enforcement of charging order under the Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 14, 15, and Ord. XLVI. r. 1. See *Kolchmann v. Meurice*, [1903] 1 K. B. (C. A.) 534.

formed in England, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.

### Comment.

Subject to the proviso with reference to persons ordinarily resident or domiciled<sup>1</sup> in Scotland or Ireland, the Court has jurisdiction to entertain an action for a *breach in England* of any contract, *wherever made*, which according to the terms thereof ought to be *performed in England*.<sup>2</sup>

The jurisdiction of the Court under this Exception depends then upon two conditions:—

*1st Condition.*—The *breach in England* of the contract on which an action is brought. The contract may be made anywhere, but it is essential that the breach should take place in England. It is sometimes not easy to determine the country in which a contract is broken. This difficulty is apt to arise where the breach of a contract, *e.g.*, the wrongful dismissal of *A* by *X* from *X*'s service, or the announcement by *X* that he does not intend to perform his contract with *A*, takes place by letter. In these circumstances the breach, it has been decided, is committed in the country where the letter is posted by *X*, *e.g.*, Germany, and not in the country, *e.g.*, England, where it is received by *A*.<sup>3</sup>

*2nd Condition.*—The contract sued upon must be one which *according to the terms thereof ought to be performed in England*. It is not necessary that the contract should state in so many words that it is to be performed in England. It is enough if from the nature of the contract and the circumstances of the case it clearly appears that the contract ought to be performed in England. "The question we have to consider is this: what "is the meaning of 'which, according to the terms thereof, ought

<sup>1</sup> As to effect of these words, see pp. 229, 230, *ante*.

<sup>2</sup> This comes near to the possession by the Court of jurisdiction in respect of any contract to be performed in England, for in general, though by no means always, the breach of a contract which is to be performed in a particular country must take place in that country. Still, this is not invariably the case. *X* agrees in Germany to employ *A* in England. *X* posts a letter in Germany in which he, without lawful cause, dismisses *A*, or announces that he will not employ *A*. This is a breach in Germany, and not in England, of a contract to be performed in England. *Holland v. Bennett*, [1902] 1 K. B. (C. A.) 867; *Hamilton v. Barr* (1886), 18 L. R. Ir. 297; *Cooper v. Knight* (1901), 17 T. L. R. 299.

<sup>3</sup> *Hamilton v. Barr* (1886), 18 L. R. Ir. 297; *Holland v. Bennett*, [1902] 1 K. B. (C. A.) 867; *Mutzenbecher v. La Aseguradora Espanola*, [1906] 1 K. B. (C. A.) 254.

“ ‘to be performed within the jurisdiction’? [*i.e.*, in England].  
 “ It was said by the appellant to mean that it must be an express  
 “ term of the contract that it should be performed within the  
 “ United Kingdom.<sup>1</sup> In my opinion, that is not the true con-  
 “ struction. The difficulty arises from the words ‘according to  
 “ the terms thereof;’ but in my opinion those words mean, that  
 “ you must look at the contract and at the facts which existed at  
 “ the time when the contract was made, and then determine  
 “ whether, having regard to the terms, the contract was one which  
 “ ought to be performed within the jurisdiction [in England],  
 “ and do not mean that there must be an express provision that  
 “ the contract is to be performed within the jurisdiction” [in  
 England].<sup>2</sup>

Nor is it necessary that the whole of the contract should be performable in England. It is sufficient if some part of the contract is to be performed in England, and if there is a breach of that part of it in England.<sup>3</sup> Thus it is enough if *X* is bound to pay *A* in England for some service done by *A* out of England, and declines to make the payment.<sup>4</sup>

Does the Court acquire jurisdiction under this Exception from the fact that the part of a contract to be performed by *A*, the plaintiff, ought to be performed in England and, let us assume, has been performed, whilst the part of the contract to be performed by *X*, the defendant, and which *X* has broken, may be performed either in England or elsewhere.<sup>5</sup> To this inquiry no authoritative answer has been given, but it is submitted that the words “ought to be performed” mean ought to be performed by the defendant, *i.e.*, by the person charged with the breach of contract.<sup>6</sup>

Unless both of the above conditions are fulfilled, Exception 5 does not apply. The Court has under this Exception no jurisdiction over *X* in respect of any contract which either has not been broken in England or ought not to be performed in England.<sup>7</sup>

<sup>1</sup> Should be, *semble*, “England.” The words “within the jurisdiction” do not mean, *e.g.*, in Scotland or Ireland.

<sup>2</sup> *Reynolds v. Coleman* (1887), 36 Ch. D. (C. A.) 453, 464, per Cotton, L. J. See *Robey v. Snacfell Mining Co.* (1887), 20 Q. B. D. 152; *Rein v. Stein*, [1892] 1 Q. B. (C. A.) 753, judgment of Lindley, L. J.

<sup>3</sup> *Rein v. Stein*, [1892] 1 Q. B. (C. A.) 753, 757, judgment of Lindley, L. J.

<sup>4</sup> *Robey v. Snacfell Mining Co.* (1887), 20 Q. B. D. 152.

<sup>5</sup> *Mutzenbecher v. La Aseguradora Espanola*, [1906] 1 K. B. (C. A.) 254.

<sup>6</sup> See *Rein v. Stein*, [1892] 1 Q. B. (C. A.) 753.

<sup>7</sup> *The Ender*, [1893] P. (C. A.) 119; *Holland v. Bennett*, [1902] 1 K. B. (C. A.)

The Court has not, under this Exception, jurisdiction<sup>1</sup> to entertain an action against any person *domiciled* or *ordinarily resident*<sup>2</sup> in Scotland or Ireland.

### Illustrations.

1. *A*, an American residing in England, brings an action against *X*, an American residing in America, to enforce a contract made in England to transfer to *A* shares in an English company. Neither *X* nor *A* is domiciled in England. The Court has jurisdiction.<sup>3</sup>

2. *A*, a merchant in England, consigns to *X*, a German subject, carrying on business in Germany, goods for sale in Germany. There is no express stipulation as to the place of payment for the goods, but according to the course of business in similar transactions between *X* and *A*, payment would be made in England. *A* brings an action against *X* for the price of the goods. The Court has jurisdiction.<sup>4</sup>

3. *A* is an engineer carrying on business at Lincoln. *X & Co.* are a company carrying on business and domiciled in the Isle of Man. *A* contracts to deliver machinery at the mine of *X & Co.* in Man, and to set it up to their satisfaction at the price of 6,000*l.* *A* brings an action for the price. The Court has jurisdiction.<sup>5</sup>

4. *X*, a merchant at New York, contracts to supply goods to *A*, a merchant in London, on certain terms. On arrival of goods in London they are defective and not in accordance with contract. The defects are not due to the voyage. *A* brings an action against *X* for breach of contract. The Court has jurisdiction.<sup>6</sup>

<sup>1</sup> See *Agnew v. Usher* (1884), 14 Q. B. D. 78; *Kaye v. Sutherland* (1887), 20 Q. B. D. 147.

<sup>2</sup> As to the distinction between domicile and residence, see pp. 229, 230, *ante*.

<sup>3</sup> *Reynolds v. Coleman* (1887), 36 Ch. D. (C. A.) 453.

<sup>4</sup> *Rein v. Stein*, [1892] 1 Q. B. (C. A.) 753.

<sup>5</sup> *Robey v. Snaefell Mining Co.* (1887), 20 Q. B. D. 152. The ground of jurisdiction is that it must be taken to be a term of the contract that payment should be made in England. If *A* were not in England, *X & Co.* could not, under Exception 5, maintain an action against him there for non-delivery of goods. But they might probably under Exception 3. Contrast *Bell v. Antwerp, &c. Line*, [1891] 1 Q. B. (C. A.) 103.

<sup>6</sup> *Barrow v. Myers* (1888), 52 J. P. 345; 4 Times L. R. 441. *Semble*, on ground that breach was continuing, but surely non-delivery in England of goods according to sample is distinctly a breach in England. Compare *Gray v. Press Association* (1887), 22 L. R. Ir. (C. A.) 1.

5. *A* leases land in Middlesex to *X* and brings an action against *X* for the rent. The Court has jurisdiction.<sup>1</sup>

6. *X*, a French citizen residing in France, buys goods in London from *A*, who brings an action for the price of the goods. The Court has jurisdiction.<sup>2</sup>

7. *A*, a merchant in England, sells goods to *X & Co.*, resident out of England. Under the terms of the contract, and the special circumstances of the case, it may be inferred that payment for the goods was to be made in England. *A* brings an action for the price of the goods. The Court has jurisdiction.<sup>3</sup>

8. *X*, a timber merchant residing in Sweden, contracts with *A*, in Sweden, to sell and deliver goods in England to *A*, the goods to be at the risk of *X* until delivered to *A*. *A* brings action against *X* for non-delivery. The Court has jurisdiction.<sup>4</sup>

9. *X & Co.*, an Indian firm, make a contract with *A* at Bombay to work certain mines in India as a joint adventure, in which *X & Co.* are to find the capital, *A* to acquire the mining rights, and each partner to take one half of the profits. *X & Co.* afterwards go into liquidation in India, and their property is vested in *Y*, a trustee residing at Bombay. *Y*, through an agent in England, enters there into a contract for the sale of the mining rights to a purchaser without mention of *A*'s rights. *A* brings an action against *X & Co.* and *Y*, claiming a declaration that under the original agreement he is entitled to half the profits of the mining adventure, &c., and an injunction to restrain *X & Co.* and *Y* from carrying agreement with purchaser in England into effect. The Court has jurisdiction.<sup>5</sup>

10. *A*, a manufacturer in Lancashire, supplies machinery to *X*,

<sup>1</sup> See *Agnew v. Usher* (1884), 14 Q. B. D. 78. In the particular case there was a want of jurisdiction because *X* was domiciled in Scotland, and came, therefore, within the proviso. *Semble*, otherwise there would have been jurisdiction.

<sup>2</sup> See *Hewitson v. Fabre* (1888), 21 Q. B. D. 6. *Semble*, that in this case the error committed by the plaintiff was service of a writ instead of notice, but that the Court had jurisdiction.

<sup>3</sup> *Ducal v. Gans*, [1904] 2 K. B. (C. A.) 685. But see *Comber v. Leyland*, [1898] A. C. 524.

<sup>4</sup> *Aliter* if the goods were to be delivered to *A* in Sweden. Compare *Wancke v. Wingreen* (1889), 58 L. J. Q. B. D. 519. See, also, *Harris v. Fleming* (1879), 13 Ch. D. 208.

<sup>5</sup> The ground is, that the later contract made in England constitutes a breach in England of the contract made with the plaintiff abroad. Compare *Harris v. Fleming* (1879), 13 Ch. D. 208, which, though decided under the Rules of 1875, seems, as far as concerns the point given in the illustration, applicable to the Rules of Court, 1883.

an Italian living in Italy. The contract for the supply of the machinery is made in England, and payment is to take place in England. The machinery is not paid for. *A* brings an action against *X*, who is in Italy, for the price. *Semble*, the Court has jurisdiction.<sup>1</sup>

11. An agreement between *A*, an insurance agent in London, and *X & Co.*, a Spanish insurance company domiciled at Teneriffe, that *X & Co.* shall employ *A* as their exclusive representative for a period of five years in England and elsewhere. At the end of one year *X & Co.* send *N*, their general agent, to England, with authority to revoke the agreement. *N* revokes it by notice in writing, sent to *A* through the post, to *A*'s place of business in London. *A* brings an action against *X & Co.* for breach of contract. The Court has jurisdiction.<sup>2</sup>

12. *A & Co.*, residing in the Isle of Man, undertake to build there a house for *X*, an Englishman living in London. *X* is to pay *A & Co.* 1,000*l.* for their work, and payment is to be made *in London*. *X*, by letter posted in London, directed to *A & Co.* in the Isle of Man, repudiates all liability under the contract, and goes to France. *A & Co.* bring an action against *X*. The Court (*semble*) has jurisdiction.<sup>3</sup>

13. *X* contracts in England with *A* for the delivery at New York of cotton lying at Bombay. The cotton is not delivered. *A* brings an action against *X*. The Court has no jurisdiction.<sup>4</sup>

<sup>1</sup> But conf. *Dobson v. Festi*, [1891] 2 Q. B. (C. A.) 92.

<sup>2</sup> *Mutzenbecher v. La Aseguradora Espanola*, [1906] 1 K. B. (C. A.) 254. The agreement was clearly broken in London, the letter of dismissal being posted in London. The difficulty is to show that *X & Co.* committed a breach of contract which ought to be performed by them in England. The Court held that "the agreement by [*X & Co.*] was to employ [*A*] as their exclusive representative in England for five years. Such an agreement must involve at least this—an undertaking on their part that they will do nothing in England to prevent [*A*] from fulfilling [his] contract, and will do all things necessary in England to enable [*A*] to perform [his] part of the contract. If this is so [*X & Co.*] have not done that which they agreed to do, because notice was given, by their authority, declaring the agreement of agency to be void from the date of the notice. That notice appears to have been addressed from the office of [*X & Co.*'] solicitors in London, and to have been enclosed in a letter from [*X & Co.*] to [*A*]. Therefore [*X & Co.*] have not done that which they agreed to do, for, in England, they have put an end to the agreement." P. 261, judgment of Sir J. Gorell Barnes, President.

<sup>3</sup> The part of the contract to be performed by *X* ought to be performed in England. Compare *Robey v. Snaefell Mining Co.* (1887), 20 Q. B. D. 152.

<sup>4</sup> The contract, though made in England, was not to be performed in England, and no breach took place in England. The Court would have had jurisdiction under R. S. C. 1875, Ord. XI. r. 1.



14. *X* contracts in India with *A* to deliver cotton of a certain quality to *A* in Scotland. The cotton is not delivered. The non-delivery of the cotton, which *A* could have used in his manufactory in England, or could have sold in England in performance of a contract with *N*, causes *A* damage in England. *A* brings an action against *X* for non-delivery. The Court has no jurisdiction.<sup>1</sup>

15. *A* agrees at Paris with *X*, a French wine merchant residing in France, to act for *X* as commission agent in England. *A* returns to England. *X*, being dissatisfied with *A*, writes and posts a letter in France wrongfully dismissing *A*. *A* brings an action against *X* for wrongful dismissal. *Semble*, the Court has no jurisdiction.<sup>2</sup>

16. *A*, in England, sells goods to *X*, residing in France. It is part of the terms of the contract that the goods shall be paid for at Paris. *X* does not pay. *A* brings an action for the price. The Court has no jurisdiction.<sup>3</sup>

17. *X* carries on business in Brazil, and there contracts with *A & Co.* to sell goods sent to him by *A & Co.*, and to remit the proceeds to England in first-class bills. *X* sells the goods, and keeps the proceeds. Action by *A & Co.* for breach of contract. The Court has no jurisdiction.<sup>4</sup>

18. A German ship owned by *X & Co.*, Germans, is stranded within three miles of the English coast. An agreement through the master with two foreign salvage companies, *A* and *B*, that they will do their best to convey the ship to England against a salvage reward of 50 per cent. of property. The amount to be paid to *A* within ten days after salvage. No place of payment is specified. Action by *A* and *B* for salvage money. The Court has no jurisdiction.<sup>5</sup>

<sup>1</sup> Compare *Shearman v. Findlay* (1883), 32 W. R. 122.

<sup>2</sup> *Hamilton v. Barr* (1886), 18 L. R. Ir. (C. A.) 297. The decision rests on the ground that the dismissal, *i.e.*, the breach of contract, took place in the country where the letter was posted. But whether this is so?

<sup>3</sup> See *Thomas v. Duchess of Hamilton* (1886), 17 Q. B. D. (C. A.) 592. But note that actions which do not come within Exception 5 might perhaps come under Exception 3, on account of the residence or domicile of the defendant. See, also, *Moritz v. Stephan* (1888), W. N. 147.

<sup>4</sup> *Comber v. Leyland*, [1898] A. C. 524. The contract could all be performed abroad. No writ therefore could be issued here for service out of England in an action either for breach of contract or for money had and received. Contrast *Duval v. Gans*, [1904] 2 K. B. (C. A.) 685.

<sup>5</sup> *The Eider*, [1893] P. (C. A.) 119. As no obligation to pay salvage money in England, no breach of contract in England.

19. *A* is employed by *X*, an alien resident in France, as correspondent of a London newspaper of which *X* is proprietor. *X* gives notice of dismissal to *A* by a letter written and posted at Naples, and directed to *A* in England. *A* brings an action for wrongful dismissal. The Court has no jurisdiction.<sup>1</sup>

20. *X* agrees in Germany with *A* to act as *A*'s secretary for five years in England, and *A* agrees to pay *X* 100*l.* a year in England. *X* whilst in Germany posts a letter to *A*, refusing to enter into *A*'s service. *A* brings an action against *X* for breach of contract. Whether the Court has jurisdiction? <sup>2</sup>

21. *A & Co.*, residing in the Isle of Man, undertake to build there a house for *X*, an Englishman living in London. *X* is to pay *A & Co.* 1,000*l.* for their work, and payment is to be made in the Isle of Man. *X*, by letter, posted in London, directed to *A & Co.* in the Isle of Man, repudiates all liability under the contract, and goes to France. *A & Co.* bring an action against *X*. The Court has no jurisdiction.<sup>3</sup>

22. *A & Co.*, German bankers carrying on business in Germany, claim, as against *X*, resident in Germany, a declaration that they are entitled to a charge on certain policies of life assurance deposited with them, and that the said charge might be enforced by foreclosure. The Court has no jurisdiction.<sup>4</sup>

23. *A* brings an action against *X* for non-payment of rent due under a lease of land in England. *X* is domiciled or ordinarily resident in Scotland. The Court has no jurisdiction.<sup>5</sup>

24. *A* is the outgoing tenant of a farm in Yorkshire. He brings an action against *X*, his landlord, who is ordinarily resident in Scotland, to recover compensation for tenant right, according to the custom of the country. The Court has no jurisdiction.<sup>6</sup>

<sup>1</sup> *Holland v. Bennett*, [1902] 1 K. B. (C. A.) 867. As the breach, if any, is committed at the place where the letter is posted, the breach does not take place in England. See *Hamilton v. Barr* (1888), 18 L. R. Ir. 297; *Mayer v. Claretie* (1890), 7 T. L. R. 4. Contrast *Mutzenbecher v. La Aseguradora Espanola*, [1906] 1 K. B. (C. A.) 254, and *Cooper v. Knight* (1901), 17 T. L. R. 299.

<sup>2</sup> *Semble*, the breach of contract takes place in Germany and not in England.

<sup>3</sup> The breach of the contract takes place in England, but no part of the contract ought to be performed in England. Contrast *Robey v. Snaefell Mining Co.* (1887), 20 Q. B. D. 152.

<sup>4</sup> *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283, *i.e.*, has no jurisdiction under Exception 5, or Ord. XI. r. 1 (e). The action is not an action for a breach of contract.

<sup>5</sup> *Agnew v. Usher* (1884), 14 Q. B. D. 78.

<sup>6</sup> But has jurisdiction under Exception 2 (p. 226, *ante*). *Kaye v. Sutherland* (1887), 20 Q. B. D. 147.

25. *A* brings an action against *X* for breach of a contract to deliver goods to *A* in London. *X* is a Scotchman, who more often than not resides in England, but *X*'s domicile of origin is Scotch and he has never lost his Scotch domicile. The Court has no jurisdiction.<sup>1</sup>

26. *A* brings an action against *X & Co.* for breach of contract. *X & Co.* have registered office in Scotland, but also carry on business in England. The Court has no jurisdiction.<sup>2</sup>

27. *X* is an Englishman whose domicile is English, but who ordinarily resides in Scotland. *A* brings an action against *X* for a debt incurred and payable in England. The Court has no jurisdiction.<sup>3</sup>

28. *X* is an Englishwoman, married to a Scotchman, who is domiciled and habitually lives in Scotland. *X* is separated from her husband and is settled in England, but is in France. *A* brings an action against *X* for a debt incurred and payable in London. The Court has (*semble*) no jurisdiction.<sup>4</sup>

*Exception 6.*<sup>5</sup>—The Court has jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be

<sup>1</sup> Whether the Court has jurisdiction under Exception 3? See *Lenders v. Anderson* (1883), 12 Q. B. D. 50.

<sup>2</sup> See *Watkins v. Scottish Imperial Co.* (1889), 23 Q. B. D. 285; and compare *R. S. C.* 1883, Ord. IX. r. 8, and Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62.

“Undoubtedly there is hardship in making the plaintiff sue in the Scotch Courts, but there is an insurmountable difficulty in the way of her suing in England. The defendants are a corporation carrying on business both in Scotland and England, but their registered office is in Scotland, and they are ordinarily resident in that country. We are bound by the language of the rules, and their clear meaning is that Scotchmen and Irishmen cannot be sued in England, if they are domiciled or ordinarily resident in Scotland or Ireland; and the effect of s. 62 of the Companies Act, 1862, which provides for service upon companies generally, and which is expressly preserved by Ord. IX. r. 8, makes the principle of these rules applicable to Scotch and Irish corporations.” 23 Q. B. D., p. 286, judgment of Mathew, J.

Contrast the position of a foreign company which is not a Scotch or an Irish company. *Haggin v. The Comptoir d'Escompte de Paris* (1889), 23 Q. B. D. (C. A.) 519.

<sup>3</sup> Whether the Court has jurisdiction under Exception 3? See pp. 229 and 231, note 2, *ante*.

<sup>4</sup> *Ibid.* It is clear that *X* is domiciled in Scotland. See *Dolphin v. Robins* (1859), 7 H. L. C. 39<sup>n</sup>, and Rule 9, Sub-Rule 2, p. 132, *ante*.

Note that Exception 5 does not apply to any action which is not in strictness an action for breach of contract. *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283.

<sup>5</sup> Ord. XI. r. 1 (f).

prevented or removed, whether damages are or are not sought in respect thereof.

### Comment.

The injunction sought for should have reference to something to be done in England, or to a nuisance in England.<sup>1</sup>

### Illustrations.

1. *X*, resident in Dublin, sends cards to *A* in London, through the post-office and otherwise, containing libellous and defamatory matter. *A* brings an action claiming an injunction to restrain *X* from sending such post-cards, and also claiming damages. The Court has jurisdiction.<sup>2</sup>

2. *X & Co.* carry on business in Scotland, having a registered office in Glasgow. *X & Co.* at Manchester infringe *A*'s trade-mark. *A* brings an action to restrain infringement. The Court has jurisdiction.<sup>3</sup>

3. *A* is the patentee of a particular kind of watch-case. *X*, in Glasgow, sells watch-cases of the patented kind in Scotland, and also in England, and particularly in Liverpool and in Manchester. *X* also, in answer to applications by customers in England, sends the patented watch-cases to England in return for payment in Scotland. *A* brings an action against *X* for infringement of patent, and to obtain injunction against infringement of patent by *X* in England. The Court has jurisdiction.<sup>4</sup>

4. *X* resides in Scotland, and there contracts with *A & Co.*, an English company, to perform certain services in the Transvaal at a salary. He goes to the Transvaal, but returns thence before he has fully performed his contract. *A & Co.* refuse to pay *X* part of salary which he claims. *X* threatens a petition for the winding-up of *A & Co.* *A & Co.* bring an action against *X*, claiming (1) rescission of contract, (2) return of moneys paid, (3) injunction to restrain *X* from presenting petition. The Court has jurisdiction.<sup>5</sup>

<sup>1</sup> Compare *In re De Penny*, [1891] 2 Ch. 63.

<sup>2</sup> *Tozier v. Hawkins* (1885), 15 Q. B. D. 650; (C. A.) 680.

<sup>3</sup> *In re Burland's Trade Mark* (1889), 41 Ch. D. 542. Compare *Marshall v. Marshall* (1888), 38 Ch. D. (C. A.) 330.

<sup>4</sup> *Speckhart v. Campbell* (1884), W. N. 24. Compare *In re Burland's Trade Mark* (1889), 41 Ch. D. 542; and *Kinahan v. Kinahan* (1890), 45 Ch. D. 78.

<sup>5</sup> *Lisbon Berlyn Gold Fields v. Heddl* (1885), 52 L. T. 796. *Semble*, that the

5. *N*, a trader in England, orders goods from *X*, a foreign manufacturer in Switzerland. *X* addresses the goods to *N* in England and delivers them to the Swiss post-office by which they are forwarded to England. The goods are manufactured by *X* according to an invention protected by an English patent. An action by *A*, the patentee, against *X* claiming an injunction against infringement of patent. The Court has no jurisdiction.<sup>1</sup>

*Exception 7.*<sup>2</sup>—Whenever any person out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the Court has jurisdiction to entertain an action against such first mentioned person as a co-defendant in the action.

#### Comment

It may be necessary or proper that a plaintiff, *A*, should make not only one person, *X*, but also some other person, *Y*, defendant in an action. This is so, for example, where *X* and *Y* are joint debtors, or where *A* has a claim, alternatively, either against *X* or *Y*. Under these circumstances, one of the defendants, *X*, may be in England and be duly served with a writ, whilst the other defendant, *Y*, may be out of England, so that it is impossible to effect service on him in England. This is the state of things to which Exception 7 applies.

In order that under these circumstances the Court may have jurisdiction within Exception 7, three conditions must be fulfilled:—

*First.* There must be an action properly brought against *X*, the original defendant. By “properly brought” is meant that it is brought against *X* as a principal or substantial defendant. He must not be, that is to say, a person against whom the action is

claim for an injunction gets rid of the exception as to Scotland. See *In re De Penny*, [1891] 2 Ch. 63.

<sup>1</sup> The sale and delivery of the goods by *X* was complete on their being delivered to the post-office in Switzerland. Nothing was done by *X* in England for which *A* had a right of action. *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bundeschledler*, [1898] A. C. 200. *Aliter* if *X* had brought the goods to England and there sold them? *Semble*, in the particular case, that (1) there was neither a right of action against *X* if (*e.g.*) he had appeared before the Court, nor (2) a right to serve him with process out of England.

<sup>2</sup> Compare the language of Ord. XI. r. 1 (g).

brought for the sake of giving the Court jurisdiction over his co-defendant, *Y*.<sup>1</sup>

The original action may be an action for a tort.<sup>2</sup>

*Secondly.* *X* must be duly served with the writ in England.

It would appear to follow that Exception 7 has no application either where all the defendants, or none of the defendants, in an action, are in England. It is applicable, in other words, only where one at least of the defendants is in England and one at least of the defendants is not in England.<sup>3</sup> Hence, where Exception 7 applies, the Court may have jurisdiction to entertain an action against a person over whom, if the action had been brought against him alone, the Court would have had no jurisdiction.<sup>4</sup>

*Thirdly.* *Y*, who is out of England, must be either a necessary or proper party to the action.

<sup>1</sup> See, especially, *Yorkshire Tannery v. Eglinton Co.* (1884), 54 L. J. Ch. 81. "I think," says Pearson, J., "that if I had such an application [*i.e.*, an application "to allow, under Ord. XI. r. 1 (g), service of a writ on a defendant in Scotland] "before me, I should require it to be shown that the person . . . served within "the jurisdiction [*i.e.*, the original defendant, *X*] was either the principal "defendant, or at least as much a substantial defendant as the person sought "to be served out of the jurisdiction. I cannot think that it is the intention "of this Rule of Court to bring into this country an action which was properly "a Scotch action, simply because some person who had some trifling interest in "the matters in dispute, and who was not a principal defendant, was made a defendant and was resident here. I think that the Order means that where there is "a proper English action, in which the party substantially sued is resident here, "and in which some other party [*Y*] who is out of the jurisdiction is sued in "respect of some trifling claim, then that person [*Y*] may be served out of the "jurisdiction." *Ibid.*, p. 83. See and compare *Tassell v. Hallen*, [1892] 1 Q. B. 321; *Collins v. North British, &c. Ins. Co.*, [1894] 3 Ch. 228.

In order to appreciate the bearing of Mr. Justice Pearson's language, it must be remembered that the question actually before the Court is the technical question whether leave should be granted to serve a writ out of England under Ord. XI. r. 1 (g); that this, however, involves a question of jurisdiction, and that Exception 7 is based on Ord. XI. r. 1 (g). There does not, it must be added, appear to be authority for the suggestion that the interest of *Y* in the matters in dispute need be trifling. See also *Witted v. Galbraith*, [1893] 1 Q. B. (C. A.) 577; and *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283.

<sup>2</sup> *Croft v. King*, [1893] 1 Q. B. 419; *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142.

<sup>3</sup> Whether it may apply where both defendants are out of England, but one of them, *X*, is served with a writ out of England under some other clause of Ord. XI., *e.g.*, under clause (c) (Exception 3) as a person domiciled in England? The words of Ord. XI. r. 1 (g) seem to show that this question must be answered in the negative, for in the supposed case the original defendant, *X*, is not served within the jurisdiction. But see *Harvey v. Dougherty* (1887), 56 L. T. 322, where a contrary opinion seems to be expressed or implied.

<sup>4</sup> *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142, 145, judgment of Esher, M.R.; and p. 148, judgment of Rigby, L. J.

The question whether *Y* is a proper party to an action against *X* depends on this: Supposing both *X* and *Y* had been in England, would they both have been proper parties to the action? If they would, and only one of them, *X*, is in this country, then, under our Exception, the Court has jurisdiction to entertain an action against the other, *Y*, just as if he had been in this country.<sup>1</sup>

"If a person is mixed up in a transaction carried out in this country by English subjects, I see no reason why he should not be dealt with, for the purpose of service of process, as if he was amenable to the jurisdiction of the Courts here. If he does not choose to submit to the jurisdiction he must take his chances, and no remedy will be effective against him unless he has property in this country. I see no particular hardship in saying that he must come to the Courts of this country if he wishes to defend himself."<sup>2</sup>

Exception 7 applies to a defendant domiciled or ordinarily resident in Scotland<sup>3</sup> or Ireland.

### Illustrations.

1. *X*, on instructions from *Y*, enters, as agent for *Y*, into a contract with *A*. The contract is made in London, and is to be performed out of England. *Y* repudiates the contract. *A* brings an action against *X*, who is in England, for breach of warranty that *X* was authorised to contract for *Y*, who is in Austria, and has an alternative claim against *Y* if *X* was authorised to contract for him. The Court has jurisdiction to entertain an action against *Y* as co-defendant with *X*.<sup>4</sup>

2. *A* brings an action against *X* and *Y* for breach of agreement to convey to *A* their respective shares in partnership

<sup>1</sup> See *Massey v. Heynes* (1888), 21 Q. B. D. (C. A.) 330, 338, judgment of Esher, M. R.; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *The Duc D'Aumale*, [1903] P. (C. A.) 18.

<sup>2</sup> 21 Q. B. D., p. 334, judgment of Wills, J.

<sup>3</sup> See *The Washburn, &c. Co. v. The Cunard Co. & Parkes* (1889), 5 Times L. R. 592, judgment of Stirling, J.; *Massey v. Heynes* (1888), 21 Q. B. D. (C. A.) 330, with which contrast language of Grove, J., and Huddleston, B., in *Speller v. Bristol Co.* (1884), 13 Q. B. D. 96, 98, 99. But see *Harvey v. Dougherty* (1887), 56 L. T. 322.

<sup>4</sup> *Massey v. Heynes* (1888), 21 Q. B. D. (C. A.) 330. Note that if the action had been against *Y* alone, the Court would not have had jurisdiction. In other words, the Court may have jurisdiction under Ord. XI. r. 1 (g) where it would not have jurisdiction under Ord. XI. r. 1 (e). See *Indigo Co. v. Ogilvy*, [1891] 2 Ch. (C. A.) 31.

formerly carried on by *A*, *X*, and *Y*. *X* is served with a writ in England. *Y* is in the United States. *Y* is a necessary or proper party to the action. The Court has jurisdiction.<sup>1</sup>

3. *A & Co.*, an American company, own a patent for barbed wire. *Y*, carrying on business in Ireland, buys from *N*, in America, wire which is an infringement of *A & Co.*'s patent. *X & Co.*, a steamship company, carry the wire for *Y* and land it at Liverpool for trans-shipment to *Y* in Ireland. *X & Co.* are an English company. *A & Co.* bring an action against *X & Co.* to obtain injunction against their dealing with the wire. Application for leave to add *Y* and serve *Y* with writ and notice in Ireland. The Court has jurisdiction.<sup>2</sup>

4. *A* brings an action of deceit against *X* and *Y* in respect of a fraud jointly committed by them in London. *X* is in England. *Y* is domiciled and resident in Scotland. *X* has been served with the writ, and *Y* is a necessary and proper party to the action. The Court has jurisdiction.<sup>3</sup>

5. *A* brings an action against *X*, residing in England, and against *Y*, domiciled or ordinarily residing in Scotland. Before *X* is served with the writ, *A* applies for leave to serve the writ on *Y* in Scotland. The Court has no jurisdiction.<sup>4</sup>

6. *N*, who carries on business in London, deposits policies of life insurance with *A & Co.*, a German bank, as security for advances made to him. *N* afterwards creates a second charge on same policies in favour of *Y*, who resides in Germany. *A & Co.* subsequently acquire the equity of redemption in the policies and transfer it to *X*, resident in England, as trustee for *A & Co.* An action for foreclosure is then brought against *X* by *A & Co.*, who then apply for leave to add *Y* as defendant and serve notice of writ on *Y* in Germany. The Court has no jurisdiction.<sup>5</sup>

<sup>1</sup> *Lightowler v. Lightowler* (1884), W. N. 8. "The person whom it is sought to serve is resident out of the jurisdiction [*i.e.*, out of England]; and the action, as against him, is founded on a breach of contract by him out of the jurisdiction [*i.e.*, out of England]. But it is stated that [*X*], the other defendant, has been duly served within the jurisdiction [in England]; and, as this is a partnership matter, I think that [*Y*] is a necessary or proper party." *Ibid.*, judgment of Butt, J.

Note that *Y*, had the action been brought against him alone, could not have been served out of England.

<sup>2</sup> *Washburn, & Co. v. Cunard Co. & Parkes* (1889), 5 Times L. R. 592.

<sup>3</sup> *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142.

<sup>4</sup> See *The Yorkshire Tannery v. Eglinton Co.* (1884), 54 L. J. Ch. 81.

<sup>5</sup> *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283. No actual relief was claimed



*Exception 8.*<sup>1</sup>—The Court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action.

#### Comment.

This Exception is grounded on Ord. XLVIII. rule 1.<sup>2</sup>

The Order appears indeed at first sight to do little more than allow and regulate “actions by and against firms and persons carrying on business in names other than their own,” and not to touch the extent of the Court’s jurisdiction. But Ord. XLVIII. rule 1 has in reality a wider effect, at any rate as regards actions against partnerships, than this, and in such actions may extend the jurisdiction of the Court over defendants who are absent from England. For the Order provides, in actions against a firm carrying on business in England in a firm name, a mode of serving the writ at the firm’s place of business in England which is applicable whether the members of the partnership be in England or not. Hence, in actions within Ord. XLVIII. rule 1 (*i.e.*, Exception 8), the Court has, in effect, jurisdiction to entertain actions against persons who are not resident in England.<sup>3</sup>

As to this Exception, the following points deserve notice.

(1) Exception 8 applies only to partners *carrying on business in England*, and carrying it on under a firm name.<sup>4</sup>

against X, who was therefore not properly made a defendant, but should have been joined as co-plaintiff. The action therefore was not properly brought against X. Hence Exception 7 does not apply.

<sup>1</sup> R. S. C. June, 1891, Ord. XLVIII. rr. 1, 3: *Worcester, &c. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784. Compare *Grant v. Anderson*, [1892] 1 Q. B. (C. A.) 108; *Russell v. Cambefort* (1889), 23 Q. B. D. (C. A.) 526, which, however, was decided under repealed Ord. IX. r. 6.

<sup>2</sup> “Any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.” Ord. XLVIII. r. 1.

<sup>3</sup> As to connection between rules as to the service of a writ and the jurisdiction of the Court, see *Heinemann v. Hale*, [1891] 2 Q. B. 83, 86, 87, judgment of Cave, J., and pp. 218, 222, 223, *ante*.

<sup>4</sup> See note 2, *supra*.

(2) Exception 8 extends to a firm, all or any of whom are foreigners or aliens. "If the firm carries on business [in England], then, whether it is an English or a foreign firm, and whether it also carries on business in a colony or abroad or not, a writ may be issued against the partners in the firm name without leave, under Ord. XLVIII. r. 1,"<sup>1</sup> *i.e.*, Exception 8 applies.

(3) Under Exception 8, the jurisdiction of the Court is not discretionary, for the writ may be served by the plaintiff in the way directed by the Order without leave of the Court.<sup>2</sup>

(4) Exception 8 extends to cases which may not fall within any of the foregoing seven Exceptions.<sup>3</sup>

*Question.*—Has the Court jurisdiction in cases not falling within Exceptions 1 to 7 (*i.e.*, not falling within Ord. XI. rule 1) to entertain an action against an individual who is not in England, but who carries on business in England in a name or style other than his own name?

This inquiry is suggested by the very wide terms of Ord. XLVIII. rule 11, which runs as follows: "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style, as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."

The inquiry must be answered in the negative. If the defendant is not in England, whether he be, *e.g.*, a Frenchman,<sup>4</sup> a domiciled Scotchman, or (it is submitted) an Englishman, the jurisdiction of the Court is not extended by his use in England of a trade name. In such circumstances, "A person desiring to proceed against a single person, if he is a foreigner or a Scotsman [or an Englishman], must go under Ord. XI. [*i.e.*, under Exceptions 1 to 7], and cannot proceed under Ord. XLVIII.

<sup>1</sup> *Worcester, &c. Banking Co. v. Furbank*, [1894] 1 Q. B. (C. A.) 784, 788, judgment of Esher, M. R.; and p. 790, judgment of Davey, L. J., dissenting from opinion of Coleridge, C. J., and Wright, J., in *Grant v. Anderson*, [1892] 1 Q. B. 108; and contrast *Western National Bank, &c. Co. of New York v. Perez*, [1891] 1 Q. B. (C. A.) 304, and *Indigo Co. v. Ogilvy*, [1891] 2 Ch. (C. A.) 31, decided before Ord. XLVIII. r. 1, came into force.

<sup>2</sup> *Ibid.* But the service must be effected exactly in the way prescribed by Ord. XLVIII. r. 3.

<sup>3</sup> Note that, in an action against a firm in the firm name, execution can as a rule, as regards partners who are not in England, issue only against the property of the partnership which is in England (Ord. XLVIII. r. 8), and not against the property of such absent partners which is not property of the partnership.

<sup>4</sup> *St. Gobain, &c. Co. v. Hoyer's Agency*, [1893] 2 Q. B. (C. A.) 96.

“rule 11,”<sup>1</sup> *i.e.*, under Exception 8. That is the substance and principle of the thing.

### Illustrations.

1. *Y* and *Z* carry on business in London under the firm name of *X & Co.* *A* brings an action against *X & Co.* for the breach of a contract made by *X & Co.* with *A* to carry goods for *A* from France to America. *Y* and *Z* are neither of them in England. The Court has jurisdiction to entertain the action.<sup>2</sup>

2. *Y* and *Z* are residing in Natal. They carry on business under the firm name of *X & Co.* both in Natal and in England. *A* sues *X & Co.* upon a promissory note made by *Y* and *Z* in Cape Town and payable at their London office, and *A* issues a writ against them in the name of *X & Co.* The Court has jurisdiction to entertain the action.<sup>3</sup>

<sup>1</sup> *MacIver v. Burns*, [1895] 2 Ch. (C. A.) 630, 635, per Lindley, L. J.

There is, however, some difficulty in reconciling *St. Gobain, &c. Co. v. Hoyer-mann's Agency*, [1893] 2 Q. B. (C. A.) 96, and *MacIver v. Burns*, interpreting Ord. XLVIII. r. 11, with *Worcester, &c. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784, interpreting Ord. XLVIII. r. 1.

<sup>2</sup> See *Worcester, &c. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784. It would apparently have made no difference if *Y* and *Z* had been aliens, *e.g.*, Frenchmen, carrying on business both in France and in England. *Ibid.*, pp. 787, 788, judgment of Esher, M. R.

<sup>3</sup> *Ibid.*

## NOTE.

THIRD PARTY PROCEDURE.—R. S. C. Ord. XVI. rr. 48—55. Where a defendant in an action claims to be entitled either to *contribution* or to *indemnity* against any person not a party to the action (called hereinafter a third party), the Court may in its discretion issue a notice to be served on the third party, and thus exercise jurisdiction, in the manner provided by Ord. XVI. rr. 48—55, over such third party. For the procedure in such case, the object of which is to enable a defendant in an action to establish conveniently his claim to contribution or indemnity against a third party who may not be a party to the action, the reader is referred to the Rules of Court, and works on practice. See, as to nature of claim, *Edison, &c. Co. v. Holland* (1889), 41 Ch. D. (C. A.) 28; *Eden v. Weardale, &c. Co.* (1887), 35 Ch. D. (C. A.) 287; *Johnston v. Salvage Association* (1887), 19 Q. B. D. (C. A.) 458; *Speller v. Bristol Steam Co.* (1884), 13 Q. B. D. (C. A.) 96. What is to be noted as regards the jurisdiction of the Court is, that its exercise is discretionary; that, within the limits laid down by Ord. XVI. rr. 48—55, it can be exercised over a third party who is not in England, subject, however, to this limitation, that it cannot be exercised in regard to a third party domiciled or ordinarily resident in Scotland or Ireland, when, if he were a defendant, the Court would not have jurisdiction over him, *i.e.*, in cases solely within Exception 5. Ord. XI. r. 1 (e). “The principle . . . of the *Swansea Case* still “applies; and the effect of the decision in that case, when read along “with Ord. XI. r. 1 (e) [*i.e.*, Exception 5, p. 233, *ante*], amounts to “this, that, wherever the action is founded on a breach [in England] “of a contract which, according to the terms thereof, ought to be “performed [in England], the Court may allow service of a third “party notice out [of England], unless the third party is domiciled or “ordinarily resident in Scotland or Ireland.” *Dubout, &c. Co. v. Macpherson* (1889), 23 Q. B. D. 340, 342, judgment of A. L. Smith, J. Compare *Swansea Shipping Co. v. Duncan* (1876), 1 Q. B. D. (C. A.) 644.

Third party procedure which originates in the Judicature Act, 1873, s. 24, sub-s. 3, is, as regards service out of England of a third party notice issued by a defendant under R. S. C. Ord. XVI. r. 48, governed by Ord. XI. r. 1, so that a defendant can obtain leave to serve such notice on a third party out of England only when the subject-matter of his claim falls under one or other of the specific cases enumerated in Ord. XI. r. 1 (see Rule 46, Exceptions 1 to 7) in which service of a writ out of England will be allowed. *McCheane v. Gyles*, [1902] 1 Ch. (C. A.) 287.

## CHAPTER VI.

ADMIRALTY JURISDICTION *IN REM*.<sup>1</sup>

RULE 47.<sup>2</sup>—The Court has jurisdiction to entertain an action *in rem* against any ship, or *res* (such as cargo) connected with a ship, if

- (1) the action is an admiralty action; and
- (2) the ship or *res* is in England,<sup>3</sup> or within three miles of the coast of England,

and not otherwise.

**Comment.**

All actions in the Courts of common law, at any rate after the passing of the C. L. P. Act, 1852, were, as all the actions in the King's Bench Division of the High Court now are, proceedings *in personam*.<sup>4</sup> The only strict action *in rem* now existing under English law is the action which used to belong exclusively to the Court of Admiralty, and now is properly brought in the Admiralty

<sup>1</sup> See Williams & Bruce, Treatise on the Jurisdiction, &c. of English Courts in Admiralty Actions (3rd ed.), Intro., and Part I., Jurisdiction in Admiralty, chaps. i. to ix., pp. 1—221. It is not the object of Rule 47 to give detailed information on admiralty jurisdiction, or concerning the kinds of actions which may be considered admiralty causes or actions. The object of the Rule is simply to state the extension of the Court's admiralty jurisdiction *in rem*. For further details, the reader is referred to the Admiralty Practice, by Williams & Bruce, and also to the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), and the Admiralty Court Act, 1861 (24 Vict. c. 10). See further, App., Note 11, "List of Admiralty Claims." See also, as to principle governing jurisdiction of Court as regards judgments *in rem*, General Principle No. III., Intro., p. 40, *ante*.

<sup>2</sup> See Williams & Bruce, p. 249, and Part II., chap. i.; but as to ship on her voyage, see *Borjesson v. Carlberg* (1878), 3 App. Cas. 1316.

<sup>3</sup> For meaning of "England," see pp. 68, 71, 72, *ante*.

<sup>4</sup> See *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 427, 428, 429, opinion of Blackburn, J. The C. L. P. Act, 1852, abolished real actions which were actions *in rem*. Whether the action of ejectment may not be considered in effect an action *in rem* appears an open question.

Division of the High Court against a ship or other *res*, such as cargo or freight, connected with a ship. Its object is to satisfy the claim of the plaintiff against the *res* by the transfer, sale, or other mode of dealing with the *res*. The foundation of this action *in rem* is the arrest of the ship, or other *res*, and this arrest cannot take place unless the ship, or other *res*, is either in England or in "English waters," which means within three miles of the coast of England.<sup>1</sup>

The conditions, therefore, under which the Court has jurisdiction to entertain an action *in rem* are two:—

*First.* The action must be an "admiralty action."

An admiralty action (which used to be called a cause) may be described in general terms as an action which, immediately before the coming into force of the Judicature Act, 1873, could be brought in the Court of Admiralty, or, in other words, was based on a cause of action or claim which was within the jurisdiction of the Court of Admiralty. The jurisdiction of the Court of Admiralty in civil matters depended at that date partly on its original jurisdiction, but mainly on statutory enactments, and especially on the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), and the Admiralty Court Act, 1861 (24 Vict. c. 10). An admiralty action or cause always had reference to shipping, or to contracts or transactions more or less closely connected with shipping. Every claim, in short, which the Court of Admiralty had jurisdiction to entertain, had to a certain extent a maritime character. Examples of such claims are claims depending on questions arising between the co-owners touching the ownership, possession, employment and earnings of any ship registered at any port in England;<sup>2</sup> claims to enforce bottomry bonds;<sup>3</sup> claims for damage done or received by any British or foreign ship;<sup>4</sup> claims for salvage, and the like. To give a definition covering all, and no more than all, the claims in respect of which the Court of

<sup>1</sup> Williams & Bruce (3rd ed.), p. 261. "The warrant [for the arrest] may be "served anywhere within the jurisdiction, that is, in England or Wales, or within "three miles of the coast." *Ibid.* See *Borjesson v. Carlborg* (1878), 3 App. Cas. 1316. Compare *The Nautik*, [1895] P. 121. Of course a ship might be arrested when in a Scotch, or Manx, or Jersey port, &c. But such arrest would be beyond the territorial limits of the High Court's jurisdiction, and would not give that Court the right to entertain an action against the ship.

<sup>2</sup> See Williams & Bruce, pp. 27—36, and Admiralty Court Act, 1861 (24 Vict. c. 10), s. 8.

<sup>3</sup> Williams & Bruce, pp. 47—72.

<sup>4</sup> *Ibid.*, pp. 71—113; 3 & 4 Vict. c. 65, s. 6; 24 Vict. c. 10, s. 7. Conf. *M. S. Act*, 1894 (57 & 58 Vict. c. 60), s. 688.

Admiralty had jurisdiction is, it is conceived, hardly possible, and, for the purpose of this work at any rate, unnecessary. They must, in any case, be arrived at by a process of enumeration rather than of definition. All that need here be insisted upon is, that an admiralty action is an action in respect of a claim or matter over which the Court of Admiralty had jurisdiction until that jurisdiction was transferred by the Judicature Act, 1873, to the High Court, and that such a claim was always of a more or less maritime character.<sup>1</sup>

*Secondly.* The ship or other *res* must be in England, or in English waters.

It should, however, further be remarked that the admiralty jurisdiction of the High Court may be exercised either by proceedings *in rem* or by proceedings *in personam*; the plaintiff, that is to say, may in most instances, at his option, bring an action either<sup>2</sup> *in rem*, against the ship or other *res*, or *in personam* against the owner of or other person interested in the ship or *res*, or both *in rem* against the ship and *in personam* against the owner or such other person.<sup>3</sup>

<sup>1</sup> See for an enumeration of, at any rate, the principal claims in respect of which proceedings could be maintained in the Court of Admiralty, App., Note 11, "List of Admiralty Claims." It may be well to note that the question whether an admiralty action lies, and therefore whether the Court has jurisdiction to give judgment *in rem*, may often depend on the precise terms of some provision in the Admiralty Court Act, 1840, or the Admiralty Court Act, 1861.

<sup>2</sup> See Admiralty Court Act, 1861, s. 35, and Williams & Bruce, pp. 249, 321.

<sup>3</sup> *Action in rem,—judgment in rem,—maritime lien.* These three things, which are sometimes confused together, should be carefully distinguished.

1. An action *in rem* is a proceeding to determine the right to, or disposition of, a thing under the control of a Court. The only proceeding *in rem* now existing under English law is, as already pointed out, an action *in rem* in the Admiralty Division.

2. A judgment *in rem* is a judgment whereby a Court adjudicates upon the title to, or the right to the possession of, property within the control of the Court. *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428; Story, s. 492.

An action *in rem* does not of necessity lead to a judgment *in rem*. *A* brings an action against a ship for wages due to him as a sailor. *X*, the shipowner, appears and pleads to the action. The action may end, not in a judgment *in rem* against the ship, but in a judgment *in personam* against *X*, condemning him to pay, e.g., 100*l.* and costs to *A*.

3. A maritime lien is the right which a person has to the satisfaction of a given claim against a ship in whosever's hands the ship may be. Such a lien binds the ship, not only when in the hands of the owner on whose behalf a debt or other obligation has been contracted, but also when in the hands of any person whomsoever. A maritime lien can be enforced only by proceedings in an admiralty action *in rem*. One instance of a maritime lien is this: if *A* obtains a judgment *in rem* against a ship in a foreign country, e.g., France, he can, on the ship reaching an

The Court has no jurisdiction to entertain an action against a ship or other *res* unless both the conditions of Rule 47 are fulfilled, *i.e.*, unless the action is an admiralty action and the ship or *res* is in England or in English waters.

### Illustrations.<sup>1</sup>

1. A co-ownership action is brought by *A* against a ship registered at the port of Liverpool. The Court has jurisdiction.<sup>2</sup>

2. *A* is the indorsee of a bottomry bond granted in Portugal by the master of an Italian ship, The *Gaetano*, on the ship, and her cargo on board. *A* brings an action *in rem* against The *Gaetano*. The Court has jurisdiction.<sup>3</sup>

3. A British ship, The *Clara Killam*, casts anchor near the South Foreland. Her anchor gets foul of a submarine telegraph cable. Under the master's direction, the cable is cut in order to free the anchor. The owners of the cable bring an action against The *Clara Killam* in respect of the injury to the cable. The Court has jurisdiction.<sup>4</sup>

4. *A* and *B* save the lives of the passengers and crew of a British ship off the coast of France. *A* and *B* bring an action of salvage against the ship, claiming more than 300*l*. The Court has jurisdiction.<sup>5</sup>

5. *A* brings an action against The *Vera Cruz* for loss of life of *H*, the husband, and *N*, the son of *A*, in consequence of the negligence of the master and crew of The *Vera Cruz*. The action is brought under Lord Campbell's Act, 9 & 10 Vict. c. 93. The Court has no jurisdiction to entertain the action, *or. semble.* any other action *in rem*, for the loss of life.<sup>6</sup>

English port, bring an action against the ship for the amount of the judgment, whoever be the person who is then owner of the ship. (*The City of Mecca* (1881), 6 P. D. (C. A.) 106, and Rule 106, *post*. See, as to maritime lien, *Northcote v. Owners of Henrich Bjorn* (1886), 11 App. Cas. 270, especially 276, judgment of Lord Watson, and compare *The Bold Buccleugh* (1851), 7 Moore, P. C. 267.) With a maritime lien the Rules in this chapter have no concern.

<sup>1</sup> In all the illustrations of this Rule it is assumed, unless otherwise stated, that the ship is in an English port or in English waters.

<sup>2</sup> See 24 Vict. c. 10, s. 8; Williams & Bruce, p. 33.

<sup>3</sup> *The Gaetano* (1881), 7 P. D. 1 (C. A.) 137.

<sup>4</sup> *The Clara Killam* (1870), L. R. 3 A. & E. 161; Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7. Compare *The Griefswald* (1859), Swabey, 430.

<sup>5</sup> 24 Vict. c. 10, s. 9; M. S. Act, 1894 (57 & 58 Vict. c. 60), ss. 544, 547.

<sup>6</sup> *The Vera Cruz* (1884), 10 App. Cas. 59; *The Curce*, [1906] P. 1. The reason is, that neither under Lord Campbell's Act, nor otherwise, is an action for loss of



6. *A* and *B* save the lives of the passengers of a British ship off the coast of France. The ship is in Port Douglas, in the Isle of Man. *A* and *B* have a claim for 500*l.* salvage. The Court has no jurisdiction to entertain an action by *A* and *B* for salvage against the ship.<sup>1</sup>

life an admiralty action. See 24 Vict. c. 10, ss. 7, 35. Contrast *The Clara Killam* (1870), L. R. 3 A. & E. 161; *The Sylph* (1867), L. R. 2 A. & E. 24.

<sup>1</sup> The ship is not in England or in English waters. See Williams & Bruce p. 261.

## CHAPTER VII.

JURISDICTION IN RESPECT OF DIVORCE—  
DECLARATION OF NULLITY OF MARRIAGE—  
AND DECLARATION OF LEGITIMACY.I. DIVORCE.<sup>1</sup>

## (A) WHERE COURT HAS JURISDICTION.

RULE 48.—The Court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.<sup>2</sup>

This jurisdiction is not affected by—

- (1) the residence of the parties,<sup>3</sup> or
- (2) the allegiance of the parties,<sup>4</sup> or
- (3) the domicile of the parties at the time of the marriage,<sup>5</sup> or
- (4) the place of the marriage,<sup>6</sup> or
- (5) the place where the offence in respect of which divorce is sought, is committed.<sup>7</sup>

<sup>1</sup> Westlake (4th ed.), pp. 82—96; Foote (3rd ed.), pp. 111—124; Story, ss. 200—230 b; Wharton, ss. 204—239 a. See, as to jurisdiction in divorce and its connection with domicile, Sub-Rule to General Principle No. III., Intro., p. 43, *ante*.

<sup>2</sup> *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435; *Gould v. Gould*, [1892] P. 240; 61 L. J. P. & D. 117; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>3</sup> See *Gould v. Gould*, [1892] P. 240; 61 L. J. P. D. 117; *Dolphin v. Robins* (1859), 7 H. L. C. 390

<sup>4</sup> *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1.

<sup>5</sup> *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435. Compare *Harvey v. Farnie* (1882), 8 App. Cas. 43, and *Turner v. Thompson* (1888), 13 P. D. 37.

<sup>6</sup> *Ibid.*, and *Ratcliff v. Ratcliff* (1859), 1 Sw. & Tr. 467.

<sup>7</sup> *Ibid.* Since the “citation,” which corresponds with the writ in an action, may be served out of England, the jurisdiction of the Court is not affected by the absence of the respondent from England during the proceedings for divorce.

In this Digest the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others.<sup>1</sup>

Comment and Illustrations.

The principle now in the main adopted by English Courts<sup>2</sup> is, that jurisdiction in matters of divorce depends upon domicile, or, in other words, that the question whether parties to a marriage ought to be divorced is one which concerns the authorities of the country where they live and have their legal home, and that, therefore, the Courts of the country where the parties are so living, *i.e.*, are domiciled, at the time of the demand for a divorce, are the Courts to which in general ought to be referred the question whether the marriage between the parties should or should not be dissolved.

"It is," says a high judicial authority, "the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another."<sup>3</sup>

<sup>1</sup> For this definition of the term "marriage," see *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130; *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

<sup>2</sup> They at one time inclined towards the quite different principle that the right to divorce depended upon the terms of the marriage contract, and, therefore, upon the law under which the marriage was celebrated, and hence held that the jurisdiction in matters of divorce belonged exclusively to the Courts of the country under the law of which the marriage took place, which was in the great majority of instances (if not always) the country where the marriage was celebrated. See *Tovey v. Lindsay* (1813), 1 Dow. 117; *Lolley's Case* (1812), 2 Cl. & F. 567; *McCarthy v. De Caux* (1812), 2 Cl. & F. 568; App., Note 12, "Theories of Divorce," and App., Note 13, "Effect of Foreign Divorce on English Marriage." *Niboyet v. Niboyet* (1878), 4 P. D. (O. A.) 1 (now in effect overruled by *Le Mesurier v. Le Mesurier*, [1895] A. C. 517) made it hard to determine the principle adopted by the High Court.

<sup>3</sup> *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, 442, judgment of Lord Penzance.

"It seems," says Lord Justice Brett, "that the only Court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being married, on account of some act which by law is treated as a matrimonial offence, is a Court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the Court must be a Court of the country in which the husband is at the time domiciled, because it is incontestable that the domicile of the wife, so long as she is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is *ex hypothesi*—still a wife."<sup>1</sup>

Hence the Court has jurisdiction to grant a divorce in any case, without exception, where the domicile of the parties (*i.e.*, in effect of the husband) is English at the commencement of the proceedings for divorce.

*H* and *W* are married in India. Adultery is committed by *W* in India. *H*, being domiciled in England, institutes a suit for divorce against *W*. The Court has jurisdiction to grant a divorce.<sup>2</sup>

*H* and *W* are a Scotch husband and wife domiciled in Scotland, who have married in Scotland. *W*, during the continuance of the Scotch domicile, commits adultery in Scotland. *H* afterwards acquires an English domicile, and then applies to the English Court for a divorce. At the time of the application, and throughout the proceedings, *W*, the wife, is in fact resident in Scotland. In prior proceedings before the Scotch Courts by *W* against *H*, these Courts held that *H* was domiciled in Scotland. *H* has, as a matter of fact, in the judgment of the High Court, acquired an English domicile. The Court has jurisdiction to pronounce a divorce between *H* and *W*.<sup>3</sup>

Of the various other circumstances which might be thought

This statement of the law is in conformity with the expressions of Lord Westbury in *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 85.

<sup>1</sup> *Niboyet v. Niboyet* (1878), 4 P. D. 1, 13, 14, judgment of Brett, L. J.; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>2</sup> *Ratcliff v. Ratcliff* (1859), 1 Sw. & Tr. 467.

<sup>3</sup> *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435. If it be borne in mind that Scotland and Ireland are, as regards divorce, to be considered foreign countries (*Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574, 585), it will be seen that the decision in *Wilson v. Wilson* supports to the full the doctrine that the Court has jurisdiction over all persons domiciled in England.

material, none are, it is conceived, of importance as *limiting*<sup>1</sup> the jurisdiction of the Court.

*As to residence.*—Residence, as contrasted with domicile,<sup>2</sup> is certainly unimportant. *H* and *W* are domiciled in England, but reside in France. *W* commits adultery in Paris. *H*, though residing abroad, can obtain a divorce from the Court.<sup>3</sup>

*As to allegiance.*—This is the tie by which a person is connected with a state<sup>4</sup> as being a subject of the sovereign of such state; and it might be thought that as a person's connection with a particular political society depends upon his allegiance, or in more popular language, his nationality, jurisdiction to declare whether a given person is to be considered married or unmarried would belong to the Courts of the state or nation of which he is a member or citizen. This, however, is not the view of English tribunals. In perfect consistency with the view that civil, as contrasted with political, status depends upon domicile, they hold that the jurisdiction of an English Court to grant a divorce is not affected by the allegiance of the parties. *H* and *W* are French subjects domiciled at Manchester, where *W* commits adultery. The Court has jurisdiction to grant a divorce.<sup>5</sup>

*As to domicile, &c.*—That the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence, in respect of which divorce is sought, was committed, has no effect in limiting the jurisdiction of the Court is certain.<sup>6</sup>

Whatever be, at the time of a marriage, the domicile of the parties thereto, or the country where the marriage is celebrated, the Court has no jurisdiction to entertain proceedings for a dissolution of the marriage for any offence which is not a ground for divorce under the law of England.<sup>7</sup>

*H* and *W*, a Scotchman and Scotchwoman, are, when domiciled in Scotland, married at Edinburgh. They afterwards acquire an

<sup>1</sup> Some of them may be of importance as giving jurisdiction.

<sup>2</sup> See *Dolphin v. Robins* (1859), 7 H. L. C. 390, 406, for expressions of Lord Chelmsford contrasting residence and domicile, and p. 83, note 1, *ante*.

<sup>3</sup> See *Gould v. Gould*, [1892] P. 240; 61 L. J. P. & D. 117; *Gillis v. Gillis* (1874), 8 Ir. R. Eq. 597.

<sup>4</sup> For difference between "state" and "country," see pp. 67, 69—71, *ante*.

<sup>5</sup> *Niboyet v. Niboyet* (1878), 4 P. D. 1. In this case no objection seems to have been made to the divorce on the ground of the husband being a French citizen, and the mere fact of a foreign allegiance does not appear in any reported case to have been treated by the Court as a ground for declining jurisdiction.

<sup>6</sup> *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, is sufficient, without other authorities, to establish this. See *Ruteliff v. Ruteliff* (1859), 1 Sw. & Tr. 467.

<sup>7</sup> For meaning of "law of England," see p. 79, *ante*.

English domicil. *H* obstinately deserts *W* for more than four years. Under the law of Scotland, such desertion is a cause for divorce. The Court has no jurisdiction to entertain proceedings by *W* for a dissolution of the marriage, desertion not being in itself a ground for divorce under the law of England.

*Proviso.—Meaning of term “marriage.”*—By the term “marriage” is meant in these Rules marriage as understood in Christendom, *i.e.*, “the voluntary union for life of one man and one woman to the exclusion of all others.”<sup>1</sup> Hence Rule 48 has no application to connections which, though called marriages, either are not intended to be for life, or are made with a view to polygamy. To what extent the law of England will recognise rights, *e.g.*, of inheritance, depending upon the institution of polygamy, is doubtful; but it is clear that the Rule in question does not apply to polygamous marriages.<sup>2</sup> It has been laid down that “it would be extraordinary “if a marriage in its essence polygamous should be treated as a “good marriage in this country. Different incidents of minor “importance attach to the contract of marriage in different “countries in Christendom, but in all countries in Christendom the “parties to that contract agree to cohabit with each other alone. “It is inconsistent with marriage, as understood in Christendom, “that the husband should have more than one wife.”<sup>3</sup> And, on the principle that “the law of this country is adapted to the “Christian marriage, and . . . is wholly inapplicable to “polygamy,”<sup>4</sup> the Divorce Court has refused even to dissolve a marriage made in Utah, according to Mormon rites, with the intention to contract a Mormon marriage.<sup>5</sup>

<sup>1</sup> See *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 133, per Lord Penzance; *Brinkley v. Attorney-General* (1890), 15 P. D. 76, 78, 79, 80, judgment of Sir J. Hannen. A marriage, though made between persons who are not Christians, *e.g.*, Japanese, is a valid marriage according to English law if, under Japanese law, one man unites himself to one woman for life to the exclusion of all others. But a union formed between a man and a woman in a foreign country is not a valid marriage, according to English law, unless it be the voluntary union for life of one man and one woman to the exclusion of all others. *In re Bethell* (1888), 38 Ch. D. 220. But conf. *Grewal v. Grewal* (Sikh Marriage Case) (1907), *Times*, Aug. 1.

<sup>2</sup> This is in reality only one instance of the principle that the rules of (so-called) private international law apply only amongst civilized states. These rules assume a certain similarity among the laws and institutions existing in the states where they are to be applied. See Intro., pp. 30, 31, *ante*.

<sup>3</sup> *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 132, per Lord Penzance.

<sup>4</sup> *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 135. See *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 531, for language of Lord Brougham; *Ardaseer Cursetjee v. Perozeboye* (1856), 10 Moore, P. C. 375, 418.

<sup>5</sup> *Ibid.*

The Court, nevertheless, did "not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves." All that was decided is, that, "as between each other, they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."<sup>1</sup>

### (B) WHERE COURT HAS NO JURISDICTION.

RULE 49.<sup>2</sup>—Subject to the possible exception herein-after mentioned, the Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings.<sup>3</sup>

#### Comment and Illustrations.

This Rule is certainly in conformity with the general run of the authorities.

There is, it is submitted (subject always to the possible exception

<sup>1</sup> *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 138, per Lord Penzance.

<sup>2</sup> *Felverton v. Felverton* (1859), 29 L. J. P. & M. 34; 1 Sw. & Tr. 574; *Le Sueur v. Le Sueur* (1876), 1 P. D. 139. Contrast *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, which, however, is disapproved of by the Privy Council in *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>3</sup> In the first edition of this work (p. 276) it was stated, on the authority of *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420, and *Callwell v. Callwell* (1860), 3 Sw. & Tr. 259, that the appearance absolutely and without protest of the respondent might give the Court jurisdiction where the parties to proceedings for divorce were not domiciled in England. But the decisions cited can not be justified on principle, and their authority is invalidated by the language of the Court in *Armitage v. Att.-Gen.*, [1906] P. 135, 140:—"Mr. Gillig, being domiciled in the State of New York, was served in England, and entered an action [in the State of South Dakota] by cross-claim. In a sense, therefore, he submitted to the jurisdiction of the Dakota Court. But, according to the view which we entertain here, that action by him would have been absolutely nugatory unless the Court in Dakota had jurisdiction. There is a passage in Mr. Dicey's book . . . [see *Conflict of Laws* (1st ed.), p. 276] where a contrary view is expressed, and where he appears to think that a party, by appearing and pleading, may give the Court jurisdiction. . . . That, I think, is not in accordance with the law of this country. In fact, I myself have so held, and I dismissed a suit some years ago on the petitioner's own evidence." *Ibid.*, p. 140, judgment of Sir J. Gorell Barnes, P. See also *Haynes v. Haynes*, Times, Nov. 3, 1896.

hereinafter mentioned), no valid ground for maintaining that residence, not amounting to domicile, gives the Court jurisdiction. In a case where all the authorities were considered<sup>1</sup> the law has thus been laid down by the Privy Council:—

“ Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance<sup>2</sup> in *Wilson v. Wilson*,<sup>3</sup> which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce.”<sup>4</sup>

Their Lordships no doubt used these words in a case which had reference to the divorce jurisdiction of a foreign Court, but they obviously intended their language to be of general application. They pointedly dissented from *Niboyet v. Niboyet*,<sup>5</sup> in which the majority of the Court of Appeal held that residence short of domicile might give the Divorce Court jurisdiction. Nor can it seriously be doubted that the principle maintained by the Privy Council would now be followed by the House of Lords, and that English Courts do not recognise the existence of a matrimonial home or a matrimonial domicile, *i.e.*, of residence falling short of a real domicile as the foundation of divorce jurisdiction.

1. *H* and *W*, his wife, are domiciled in Ireland. *W*, who is resident in England, institutes proceedings for divorce against *H*, who appears under protest. The Court has no jurisdiction to grant a divorce.<sup>6</sup>

2. *H*, a French citizen, marries *W*, an Englishwoman, at Gibraltar. *H* and *W* have resided for some years in England, but *H* resides there as French Consul and admittedly retains his French domicile of origin, not having acquired an English domicile. *W* presents a petition for divorce on the ground of adultery committed in England and desertion. *H* appears under protest and objects to the jurisdiction. The Court has no jurisdiction to grant a divorce.<sup>7</sup>

<sup>1</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>2</sup> See these words cited p. 257, *ante*.

<sup>3</sup> (1872), L. R. 2 P. & D. 435, 442.

<sup>4</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 540, per Lord Watson.

<sup>5</sup> (1878), 4 P. D. (C. A.) 1.

<sup>6</sup> See *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>7</sup> *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1. This was the judgment of the



*Exception.*—In the following circumstances, that is to say:—

- (1) Where a husband has
    - (a) deserted his wife; or
    - (b) so conducted himself towards her that she is justified in living apart from him; *and*
  - (2) the parties have up to the time of such desertion or justification been domiciled in England; *and*
  - (3) the husband has after such time acquired a domicile in a foreign country, but the wife has continued resident in England;
- the Court (*semble*) has on the petition of the wife, jurisdiction to grant a divorce.<sup>1</sup>

**Comment.**

“The Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be [justified<sup>2</sup>], was domiciled with her husband in this country; in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicile of her own in the country of the matrimonial home, it is considered that, in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country.”<sup>3</sup>

Court of Probate, which was overruled by the majority of the Court of Appeal, *dissentiente* Brett, L. J.; but *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, has in effect, though not technically, overruled the judgment of the Court of Appeal in *Niboyet v. Niboyet*, and supports the principle laid down by the Probate Division in that case.

<sup>1</sup> *Armytage v. Armytage*, [1898] P. 178, 185; *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 14, judgment of Brett, L. J.; Westlake (4th ed.), pp. 86, 87.

<sup>2</sup> See Westlake (4th ed.), p. 86. Conf. *Ogden v. Ogden*, [1908] P. (C. A.) 46.

<sup>3</sup> *Armytage v. Armytage*, [1898] P. 178, 185, judgment of Sir J. Gorell Barnes.

“ The case of an adulterous husband deserting his wife by leaving the country of his domicil and assuming to domicile himself in another, might seem to raise an intolerable injustice ; but we cannot help thinking that in such case, if sued by his wife in the country in which he had left her, he could not be heard to allege that that was not still the place of his married home, *i.e.*, for the purpose of that suit, of his domicil.”<sup>1</sup>

These weighty *dicta* are the true authority for an exception which seems reasonable, but cannot be decisively supported by any reported case,<sup>2</sup> and must (it is submitted) be limited to cases which precisely come within the terms of the exception.

### Illustrations.

1. *H* and *W*, his wife, are domiciled in England, and continue so domiciled up to the time when *H* deserts *W*, and then acquires or resumes a domicil in New York. *W* continues resident in England, and presents a petition for divorce. The Court has jurisdiction to grant a divorce.<sup>3</sup>

2. The case is the same as the foregoing, except that *H*, instead of deserting *W*, treats *W*, whilst they are still domiciled in England, in a way which justifies *W* in living apart from *H*, and *W* does in consequence leave *H*'s house, and live apart from him. On the petition of *W*, the Court has jurisdiction to grant a divorce.<sup>4</sup>

3. *H* and *W* are married in Jersey, where they are domiciled. *H* deserts *W*, and goes to reside in the United States. *W* acquires a permanent residence in England, where *H* had never been domiciled. *W* presents a petition for divorce on the ground of desertion and adultery. The Court has no jurisdiction.<sup>5</sup>

4. *H* and *W* are domiciled in England. *H* deserts *W* and goes to New York, where he acquires a domicil. *W* leaves England and takes up a permanent residence in France. *W* presents a petition for divorce. The Court has no jurisdiction.<sup>6</sup>

<sup>1</sup> *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 14, judgment of Brett, L. J.

<sup>2</sup> *Santo Teodoro v. Santo Teodoro* (1876), 5 P. D. 79, goes too far, as it decides what can now hardly be upheld, that where the domicil of the parties has been throughout foreign, the Court has jurisdiction to grant divorce to a wife who continues to reside in England though the husband has left it.

<sup>3</sup> *Conf. Armytage v. Armytage*, [1898] P. 178.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Le Sueur v. Le Sueur* (1876), 1 P. D. 139.

<sup>6</sup> *W* has neither domicil nor residence in England.

*Judicial Separation and Restitution of Conjugal Rights.*

RULE 50.—The Court has jurisdiction to entertain a suit for judicial separation or for the restitution of conjugal rights when both the parties thereto are at the commencement of the suit resident in England.<sup>1</sup>

Provided that—

- (1) the residence need not amount to domicile, but must be more permanent than mere presence in England on a visit or on a journey; <sup>2</sup>
- (2) the residence in England of one only of the parties (*semble*) is not sufficient to give jurisdiction.<sup>3</sup>

**Comment.**

The jurisdiction of the Court in matters matrimonial, other than proceedings to obtain a divorce *a vinculo* is determined in accordance with the principles and rules on which the Ecclesiastical Courts acted prior to 1858,<sup>4</sup> whence it follows that jurisdiction to entertain a suit for judicial separation (the equivalent of divorce *a mensâ et thoro*) or for the restitution of conjugal rights<sup>5</sup> depends upon the more or less permanent residence of the parties, and not upon their being domiciled in England. “Can there be any doubt,” asked James, L. J., “that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the Church and her Courts to the Sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a

<sup>1</sup> See Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22; *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 4—7 (judgment of James, L. J.), which, except as regards divorce *a vinculo (semble)*, is good law. *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 531: *Armstrong v. Armstrong*, [1898] P. 178, 186.

<sup>2</sup> *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 5.

<sup>3</sup> Westlake, p. 89, citing *Firebrace v. Firebrace* (1878), 4 P. D. 63, 68.

<sup>4</sup> “In all suits and proceedings, other than proceedings to dissolve any marriage [i.e., to obtain divorce *a vinculo*], the . . . Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the Rules and Orders under this Act.” Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22.

<sup>5</sup> See, however, Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68).

“divorce *a mensâ et thoro*, and in either case for proper alimony ?  
 “The jurisdiction of the Court Christian was a jurisdiction over  
 “Christians, who, in theory, by virtue of their baptism, became  
 “members of the one Catholic and Apostolic Church. The Church  
 “and its jurisdiction had nothing to do with the original nationality  
 “or acquired domicils of the parties, using the word domicile in the  
 “sense of the secular domicile, viz., the domicile affecting the secular  
 “rights, obligations, and status of the party. Residence, as distinct  
 “from casual presence on a visit or *in itinere*, no doubt was an  
 “important element ; but that residence had no connection with,  
 “and little analogy to, that which we now understand when we  
 “endeavour to solve, what has been found so often very difficult of  
 “solution, the question of a person’s domicile.”<sup>1</sup>

“There are unquestionably other remedies for matrimonial  
 “misconduct, short of dissolution, which, according to the rules of  
 “the *jus gentium*, may be administered by the Courts of the  
 “country in which spouses, domiciled elsewhere, are for the time  
 “resident. If, for instance, a husband deserts his wife, although  
 “their residence be of a temporary character, these Courts may  
 “compel him to aliment her ; and, in cases where the residence is  
 “of a more permanent character, and the husband treats his wife  
 “with such a degree of cruelty as to render her continuance in his  
 “society intolerable, the weight of opinion among international  
 “jurists and the general practice is to the effect that the Courts of  
 “the residence are warranted in giving the remedy of judicial  
 “separation, without reference to the domicile of the parties.”<sup>2</sup>

“It may, I think,” said Sir J. Gorell Barnes, “be safely laid  
 “down that the Ecclesiastical Courts would formerly, and this  
 “Court will now, interfere to protect a wife against the cruelty  
 “of her husband, both being within the jurisdiction [in England],  
 “when the necessities of the case require such intervention. I  
 “therefore hold that this Court has jurisdiction to entertain this  
 “suit,” *i.e.*, a suit for judicial separation.<sup>3</sup>

It should be borne in mind that, in order that this rule should  
 apply, the residence of the parties in England must be more or less  
*permanent* and must be the residence of *both* the parties.

*Question.*—In a suit for judicial separation or for the restitution

<sup>1</sup> *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 4, 5, per James, L. J.

<sup>2</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 526, 527, per Lord Watson.  
*Conf. Armytage v. Armytage*, [1898] P. 178, 188, 189.

<sup>3</sup> *Armytage v. Armytage*, [1898] P. 178, 197, judgment of Sir J. Gorell Barnes, J.

of conjugal rights, does the English domicile of the parties who are not resident in England give the Court jurisdiction?

This question must (it is submitted) be answered in the negative. The jurisdiction of the Court is the jurisdiction of the old Ecclesiastical Courts, and this jurisdiction (*semble*) had no connection with domicile except in so far as domicile might in many instances in fact involve residence in England.

### Illustrations.

1. A marriage is celebrated at Gibraltar between *H*, a Frenchman, domiciled in France, and *W*, an Englishwoman, domiciled in England. They reside for several years in England, but *H*, being a consul for France, retains his French domicile of origin. While they are residing in England *W* brings a suit for judicial separation. The Court has jurisdiction to entertain the suit<sup>1</sup>

2. *H* and *W* are domiciled in Australia. Owing to cruelty committed by *H* whilst they are travelling in Italy, *W*, his wife, seeks the protection of her parents in England, and establishes a home for herself and her children in this country. He follows her here and requires her to return with the children, which, owing to her apprehension of a repetition of the cruelty, she is afraid to do. Whilst both *H* and *W* are residing in England, *W* commences a suit for judicial separation. The Court has jurisdiction.<sup>2</sup>

3. *H* is a domiciled Frenchman. He marries in France *W*, a domiciled Frenchwoman. They become permanently resident, though they do not acquire a domicile, in England. *H* deserts *W*. She brings a suit for the restitution of conjugal rights. The Court has jurisdiction.<sup>3</sup>

4. *H*, a Frenchman, and *W* his wife, are married in France. They spend a month at the seaside in England. *W* brings a suit whilst they are both in England for judicial separation. The Court has no jurisdiction.<sup>4</sup>

<sup>1</sup> See *Niboyet v. Niboyet* (1878), 4 P. D. (C.A.) 1, where the suit was, however, for divorce *a vinculo*. It seems, however, admitted that on the ground stated by James, L. J., the Court would have had jurisdiction to maintain a suit for judicial separation.

<sup>2</sup> *Armytage v. Armytage*, [1898] P. 178.

<sup>3</sup> It seems clear on the authorities cited, p. 265, note 1, *ante*, that the jurisdiction of the Court is the same in a suit for the restitution of conjugal rights as in a suit for judicial separation, but in both cases (*semble*) the Court has discretion as to whether it will exercise its authority.

<sup>4</sup> See *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1.

5. *H* and *W*, his wife, who before marriage was a domiciled Englishwoman, marry and are domiciled in Australia. *W*, owing to cruelty committed by *H*, who continues to reside in Australia, seeks the protection of her parents in England, and establishes there a home for herself and her children. *W* brings a suit for judicial separation. *Semble*, the Court has no jurisdiction.<sup>1</sup>

6. *H* is domiciled in Australia, where he marries *W*. They come to England, but do not acquire an English domicile. *H* returns to Australia. *W* remains in England. She commences a suit for the restitution of conjugal rights. *Semble*, the Court has no jurisdiction.<sup>2</sup>

7. *H* is born in France. His father is an Englishman born and domiciled in England. *H* has never given up his English domicile of origin. He marries in France an Englishwoman domiciled in England. On account of *H*'s ill-treatment she leaves France and makes a home for herself in England. *H* remains in France. She brings a suit for the restitution of conjugal rights. The Court, *semble*, has no jurisdiction.

## II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 51.—The Court has jurisdiction to entertain a suit for the declaration of the nullity of any existing marriage<sup>3</sup>—

(1) where the marriage was celebrated in England,<sup>4</sup>  
or

(2) where the respondent is resident in England,  
not on a visit as a traveller, and not having  
taken up that residence for the purpose of  
the suit.<sup>5</sup>

<sup>1</sup> Contrast *Armytage v. Armytage*, [1898] P. 178, where the facts are pretty much the same, except that *H* is in England; and see *Firebrace v. Firebrace* (1878), 4 P. D. 63.

<sup>2</sup> *Firebrace v. Firebrace* (1878), 4 P. D. 63, 68.

<sup>3</sup> A suit for declaration of nullity cannot be entertained after a decree of separation by reason of adultery (*Guest v. Shipley* (1820), 2 Hagg. Const. 321), or after the death of one of the parties (*A. v. B.* (1868), L. R. 1 P. & D. 559), nor (*semble*) after a divorce of the parties.

<sup>4</sup> The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6; *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 17, judgment of Brett, L. J.; *Linke v. Van Aerde* (1894), 10 Times L. R. 426. Conf. *Ogden v. Ogden*, [1908] P. (C. A.) 46.

<sup>5</sup> Westlake, p. 89, s. 49, citing *Williams v. Dormer* (1852), 2 Rob. 505. Conf. *Roberts v. Brennan*, [1902] P. 143.

## Comment.

Jurisdiction to entertain a suit for the declaration of the nullity of a marriage, and to pronounce it a nullity, does not depend on the domicile<sup>1</sup> of the parties, but is given to the Court either by the place where the marriage is celebrated,<sup>2</sup> or by the place where the respondent is more or less permanently resident.

The Court may adjudicate upon the validity of a marriage celebrated in England, *i.e.*, upon the question whether a marriage has or has not been in fact contracted, without impugning the doctrine that a marriage admitted to be valid can be dissolved only by the Courts of the country where the parties are domiciled at the time of the commencement of the proceedings for a divorce. Domicil, indeed, cannot be the test of jurisdiction, for the domicile of the woman may depend on the very point demanding decision, *viz.*, the validity of the marriage.<sup>3</sup>

The law has been thus laid down in a case in which the Court was asked to pronounce a decree of nullity where both the parties were aliens, and neither of them was domiciled in England at the time when the suit was brought, but the marriage was celebrated in England:—

“The marriage contract was entered into here, and on that ground this Court was asked to deal with it. In *Simonin v. Mallac*<sup>4</sup> the parties to the marriage were domiciled French people; but the marriage was celebrated here, and the judge held that he had jurisdiction to deal with the contract. In

<sup>1</sup> *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 9, judgment of James, L. J. But see *Johnson v. Cooke* (1898), 2 Ir. Rep. Q. B. D. 130, where the Irish Court seems to have held that jurisdiction depended upon the domicile of the husband. The case was a peculiar one, because *W*, the petitioner, who married *H* in England, asked for a declaration of nullity by the Irish Court on the ground that, at the time of the alleged marriage in India, as well as at the time of the petition, *N*, whom *H* had married in Ireland, was still alive.

<sup>2</sup> *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97. Westlake, however, holds that jurisdiction in this instance depends upon residence. “The ‘jurisdiction,’ he writes, ‘of the English Court in suits for a declaration of nullity of marriage, or in respect of jactitation of marriage, is sufficiently founded by ‘the defendant’s being resident in England, not on a visit or as a traveller, and ‘not having taken up that residence for the purpose of the suit.’” Westlake (4th ed.), p. 89. Compare p. 326. He cites *Williams v. Dormer* (1852), 2 Rob. 505. The case is, however, not quite decisive, and is hardly consistent with *Simonin v. Mallac*.

<sup>3</sup> This jurisdiction forms an exception to the ordinary principle as to the criterion of jurisdiction. See Intro., General Principle No. III. p. 40, *ante*.

<sup>4</sup> (1860), 2 Sw. & Tr. 67.

“ *Sottomayor v. De Barros*,<sup>1</sup> the parties were Portuguese, and not resident or domiciled here, but the case was decided here. In “ *Niboyet v. Niboyet*,<sup>2</sup> the Master of the Rolls<sup>3</sup> said that the “ principles of dissolution of marriage did not apply to nullity “ suits, and that in these suits the validity of the ceremony was “ to be determined according to the law of the place in which “ it was celebrated. The jurisdiction of this Court to deal with “ the question of the validity of the marriage of the parties to “ the present suit was therefore clear.”<sup>4</sup>

A marriage duly solemnised abroad under and in accordance with the provisions of the Foreign Marriage Acts is to be considered, for the purpose of giving the Court jurisdiction, as a marriage solemnised in England.<sup>5</sup>

The Court may also adjudicate upon the validity of a marriage where the respondent is more or less permanently resident in England.

#### Illustrations.

1. *H*, a Frenchman, and *W*, a Frenchwoman, domiciled in France, are married in London in accordance with all the formalities required by English law, but without the consents required by French law. The marriage is declared a nullity by a French Court. *W*, when residing in England, petitions to have the marriage declared a nullity. *H* is in Italy, and though summoned does not appear. The Court has jurisdiction to entertain a suit for the declaration of the nullity of the marriage, *i.e.*, to determine whether the marriage is valid.<sup>6</sup>

2. *H* is a Dutchman and *W* a Dutchwoman. They are married in England. At that time they are both probably domiciled in England. At the time of the marriage between *H* and *W*, *H* is, in fact, married to another woman then living. Afterwards and during the lifetime of *H*, *W* marries *N*, who is domiciled in a foreign country. *W* brings a suit for a declaration of the nullity of the marriage with *H*. Neither *W* nor *H* is then domiciled in England. The Court has jurisdiction to entertain the suit, *i.e.*, to determine whether the marriage is valid.<sup>7</sup>

<sup>1</sup> (1877), 3 P. D. (C. A.) 1.

<sup>2</sup> (1878), 4 P. D. (C. A.) 1.

<sup>3</sup> Brett, L. J.

<sup>4</sup> *Linke v. Van Aerde* (1894), 10 Times L. R. 426, judgment of Gorell Barnes, J.

<sup>5</sup> *Hay v. Northcote*, [1900] 2 Ch. 262; *Simonin v. Mallae* (1860), 2 Sw. & Tr. 67.

<sup>6</sup> *Simonin v. Mallae* (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97; *Linke v. Van Aerde* (1894), 10 Times L. R. 426.

<sup>7</sup> *Linke v. Van Aerde* (1894), 10 Times L. R. 426.



3. *H*, a Frenchman, domiciled in France, marries *W*, an Englishwoman, domiciled in England. The marriage is solemnised before the British Consul at Bordeaux under and in accordance with the Foreign Marriage Act, 1892. It is declared invalid by a French Court. The English Court has jurisdiction to entertain a suit for a declaration of nullity, *i.e.*, to determine whether the marriage is valid.<sup>1</sup>

4. *H* is a Frenchman who has married *W*, a Frenchwoman, in France. *H*, though not domiciled, is permanently resident in England. *W* brings a suit for a declaration of nullity. The Court (*semble*) has jurisdiction to entertain the suit.

5. *H*, a British subject, is married to *W*, a British subject, in the Isle of Man. *H* was then and afterwards domiciled in Ireland. *W* [and *H*] are resident in England. *W* ascertains that at the time of her marriage with *H* he had been duly married to *N* at Liverpool, who was then and still is living. *W* brings a suit for declaration of nullity. *Seem*, the Court has jurisdiction to entertain the suit.<sup>2</sup>

### III. DECLARATION OF LEGITIMACY.

#### RULE 52.<sup>3</sup>

- (1) Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate<sup>4</sup> situate in England, may apply by petition to the Court, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid mar-

<sup>1</sup> *Hay v. Northcote*, [1900] 2 Ch. 262.

<sup>2</sup> *Roberts v. Brennan*, [1902] P. 143; but conf. observations of Westlake, p. 89. Compare *Johnson v. Cooke*, [1898] 2 Ir. R. Q. B. D. 130.

<sup>3</sup> Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), ss. 1, 2, 8.

<sup>4</sup> But whether in this case "personal estate" is not to be confined to interest in land?

riage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to the Court for a decree declaring that his marriage was, or is, a valid marriage; and the Court has jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, is binding to all intents and purposes on the Crown, and on all persons whomsoever.

- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the Court for a decree declaratory of his right to be deemed a natural-born British subject, and the Court has jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just; and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the Court, except as hereinafter mentioned, is valid and binding to all intents and purposes upon the Crown and all persons whomsoever.<sup>1</sup>
- (3) The decree of the Court does not in any case prejudice any person, unless such person has been cited or made a party to the proceed-

<sup>1</sup> Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 2.

ings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person, if subsequently proved to have been obtained by fraud or collusion.<sup>1</sup>

#### Comment.

*Conditions of Jurisdiction.*—The jurisdiction of the Court depends upon the petitioner fulfilling certain conditions:—

1. He must be a *natural-born* British subject,<sup>2</sup> or a person claiming to be a natural-born British subject; and it is doubtful whether, in spite of the wide terms of the Naturalization Act, 1870, s. 7,<sup>3</sup> an alien to whom a certificate of naturalization is granted is a natural-born British subject within Rule 51.<sup>4</sup>

2. The petitioner must at the time of presenting his petition either be domiciled in England *or Ireland*, or claim real or personal estate in England.<sup>5</sup>

The words “real or personal estate” probably mean land or immovables. The term “personal estate” can hardly in this connection include goods or choses in action.

He does not fulfil the requirements of our Rule if he is domiciled out of England and Ireland (*e.g.*, in the Isle of Man), unless he claims property in England. It will not bring him within it if, when domiciled, *e.g.*, in Scotland, he claims property in Ireland.

While the petitioner's domicile may be either English or *Irish* the estate claimed must be in England.

<sup>1</sup> The Legitimacy Declaration Act, 1858, s. 8. This Rule in substance repeats sects. 1, 2 and 8 of the Legitimacy Declaration Act, 1858, with one or two verbal alterations intended simply to make it read as a Rule. It is to be noted that the Court referred to in the Act is the Court for Divorce and Matrimonial Causes. But the original jurisdiction of this Court has been transferred to the High Court (see Judicature Act, 1873, ss. 3, 4, 16), and is in effect exercised by the Probate, Divorce and Admiralty Division of the High Court. *Ibid.*, s. 31.

As to Ireland, see the Legitimacy Declaration Act (Ireland), 1868 (31 Vict. c. 20); and as to Scotland, see Mackay, *Manual of Practice of the Court of Session*, p. 379, and the Legitimacy Declaration Act, 1858, s. 9.

<sup>2</sup> As to natural-born British subjects, see pp. 164, 166—172, *ante*.

<sup>3</sup> See Rule 25, p. 172, *ante*.

<sup>4</sup> *I.e.*, within the Legitimacy Declaration Act, 1858.

<sup>5</sup> 21 & 22 Vict. c. 93, ss. 1 and 2.

3. He must petition the Court to declare one or any of the following things:—

- (a) The legitimacy of the petitioner.
- (b) The validity of the petitioner's own marriage.
- (c) The validity of the marriage of the petitioner's parents or grandparents.
- (d) The petitioner's right to be a natural-born British subject.

*Nature of Jurisdiction.*—When the above conditions are fulfilled<sup>1</sup> (and not otherwise), the Court has jurisdiction to declare—

- (i) The legitimacy or the illegitimacy of the petitioner.
- (ii) The validity or invalidity of any marriage which the Court is petitioned to declare valid.
- (iii) That the petitioner has, or has not, a right to be deemed a natural-born British subject.

This jurisdiction applies as well to past as to existing marriages, and is a totally different thing from the authority inherited by the Court from the Ecclesiastical Courts to entertain a suit for the declaration of the nullity of an existing marriage.<sup>2</sup> A petitioner cannot, under Rule 52 (*i.e.*, under Legitimacy Declaration Act, 1858), pray to have a marriage declared invalid, or any person declared illegitimate, or not a British subject, though the decree of the Court may declare invalid a marriage which it is asked to declare valid, and, when asked to declare the legitimacy or the British nationality of the petitioner, may declare that he is illegitimate, or is not a natural-born British subject.<sup>3</sup>

The decree of the Court is *primâ facie* valid, and binding to all intents and purposes upon all persons whomsoever, including the Crown; but if certain persons interested in the decree are not cited, neither they nor their representatives are prejudiced thereby,<sup>4</sup> and the decree is, like other judgments, ineffective (*i.e.*, it does not prejudice any person), if proved to have been obtained by fraud or collusion.<sup>5</sup>

<sup>1</sup> Compare *Mansel v. Attorney-General* (1877), 2 P. D. 265; (1879), 4 P. D. 232; *Scott v. Attorney-General* (1886), 11 P. D. 128; *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

<sup>2</sup> See Rule 51, p. 268, *ante*.

<sup>3</sup> 21 & 22 Vict. c. 93, s. 1.

<sup>4</sup> See Rule 52, clause 3, p. 272, *ante*; and 21 & 22 Vict. c. 93, s. 8.

<sup>5</sup> *Ibid.*; and see, as to effect of foreign judgments in England, chap. xvii., especially Rule 93, p. 397, *post*; and compare generally, as to due acquisition of rights, Intro., General Principle No. I., p. 23, *ante*.

## Illustrations.

1. *A*, a natural-born British subject domiciled in England, marries first at Cape Town, and then in London, *N*, who has been divorced at Cape Town from her husband for adultery with *A*. The validity of either marriage under the law of Cape Town is doubtful. *A* petitions to have his marriage with *N* declared valid. The Court has jurisdiction.<sup>1</sup>

2. *A*, a natural-born British subject whose domicile is Irish, is for a time settled in Japan, and there marries a Japanese woman according to forms required by Japanese law. *A* petitions for a declaration that his marriage is valid. The Court has jurisdiction.<sup>2</sup>

3. *A* is a natural-born British subject domiciled in France, and claiming a freehold estate in Middlesex. *A* petitions to have himself declared the legitimate son of his parents, or to have the marriage in France of his parents declared valid. The Court has jurisdiction.

4. *A* is born, and is domiciled, in France, and has lived in France till the age of 22. *A*'s father was also born in France. *A*'s paternal grandfather was an Englishman born in England, who married, or is alleged to have married, *A*'s grandmother at Paris. *A* claims a freehold estate in Middlesex. *A* petitions to have the marriage of his grandfather and grandmother declared valid. The Court has jurisdiction.<sup>3</sup>

5. The circumstances are the same as in Illustration No. 4, except that *A* petitions to be declared a natural-born British subject. The Court has jurisdiction.<sup>4</sup>

6. *A* is a Frenchman who has become a naturalized British subject under the Naturalization Act, 1870; he is domiciled in England; he petitions to have it declared that he is the legitimate child of his parents. *Semble*, the Court has jurisdiction.<sup>5</sup>

<sup>1</sup> *Scott v. Attorney-General* (1886), 11 P. D. 128.

<sup>2</sup> *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

<sup>3</sup> This case is certainly within the words of the Legitimacy Declaration Act, 1858, s. 2. Now, however, that an alien can take, acquire, hold and dispose of real or personal property of any description in the United Kingdom (Naturalization Act, 1870, s. 2), it appears to a certain extent an anomaly that a claim to real estate in England should be a sufficient ground to give the Court jurisdiction to declare the claimant a British subject.

<sup>4</sup> *Ibid.*

<sup>5</sup> Whether the Court has jurisdiction or not depends upon the answer to the question whether the effect of the Naturalization Act, 1870, s. 7, is to make the petitioner a natural-born British subject within the meaning of 21 & 22 Vict. c. 93, s. 1. See Rule 25, p. 172, *ante*.

7. *A* is a natural-born British subject domiciled in France. He claims to succeed, as next of kin, to *goods* situate in England. He petitions to have himself declared the legitimate son of his parents. *Semble*, the Court has no jurisdiction.<sup>1</sup>

8. *A* is a natural-born British subject. He is domiciled in Scotland. He claims real estate in Ireland. He petitions to be declared the legitimate child of his parents. The Court has no jurisdiction.<sup>2</sup>

9. *A*, a natural-born British subject domiciled in England, petitions the Court for a declaration that he is his father's heir at law. The Court has no jurisdiction.<sup>3</sup>

10. *A* alleges in his petition that the marriage of the petitioner's grandfather with the petitioner's grandmother is a valid marriage, and that he is entitled to succeed to a baronetcy. The Court has no jurisdiction to adjudicate upon a claim to a title of honour.<sup>4</sup>

<sup>1</sup> Whether the Court has jurisdiction depends on the meaning of the term "personal estate" in Rule 52, *i.e.*, in 21 & 22 Vict. c. 93, s. 1.

<sup>2</sup> The petitioner is neither domiciled in England nor in Ireland, nor does he claim real or personal estate in England.

<sup>3</sup> *Mansel v. Attorney-General* (1877), 2 P. D. 265; (1879), 4 P. D. 232.

<sup>4</sup> *Frederick v. Attorney-General* (1874), L. R. 3 P. & D. 196.

## CHAPTER VIII.

JURISDICTION IN BANKRUPTCY AND IN REGARD  
TO WINDING-UP OF COMPANIES.I. BANKRUPTCY.<sup>1</sup>

## (A) WHERE COURT HAS NO JURISDICTION.

RULE 53.—The Court has no jurisdiction to adjudge bankrupt any debtor who has not committed an act of bankruptcy within the terms of Rule 59.

The term “the Court,”<sup>2</sup> in this Rule and in Rules 54 to 59, means a Court having jurisdiction in bankruptcy, under the Bankruptcy Act, 1883,<sup>3</sup> and includes

- (1) the High Court, and
- (2) any County Court having jurisdiction in bankruptcy under the said Act.<sup>4</sup>

**Comment.**

An “act of bankruptcy” is one of the series of acts enumerated in Rule 59, the commission of which by a debtor is evidence of his

<sup>1</sup> See the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 4, 6, 7, 20, 92, 93, 168; the Bankruptcy Act, 1890, s. 1; Bankruptcy Rules, 1883, r. 148; Baldwin, *Law of Bankruptcy* (9th ed.), pp. 1–151; Westlake (4th ed.), pp. 157–163; Nelson, 163–166.

It is not the aim of these Rules to enumerate all the circumstances under which the jurisdiction of the Court depends, and still less to state generally the law of bankruptcy; these Rules, further, do not state what are the circumstances under which bankruptcy proceedings should be taken in the High Court or in the County Court respectively. All the English bankruptcy Courts are, for the purpose of these Rules, treated as if they were one Court. The object of these Rules in regard to bankruptcy is to show how far the jurisdiction of the High Court or any other English bankruptcy Court is or is not affected in a given case by the case containing some foreign element, *e.g.*, by the debtor being an alien domiciled abroad, or by his debts having been incurred abroad.

<sup>2</sup> It is convenient, for the purpose of Rules 53–59, to thus extend the meaning of the term “Court.” See p. 67, *ante*.

<sup>3</sup> 46 & 47 Vict. c. 52, s. 168.

<sup>4</sup> *Ibid.*, s. 92.

insolvency. The existence of the Court's jurisdiction to entertain bankruptcy proceedings against any debtor arises from the commission by him of an act of bankruptcy.<sup>1</sup> The Court, therefore, cannot possibly have any bankruptcy jurisdiction over a debtor who has not committed an act of bankruptcy.

### Illustrations.

1. *X* is domiciled in a foreign country. *X* has contracted debts in England, and files in a Court of such foreign country a declaration of his inability to pay his debts. *A*, an English creditor, treats this as an act of bankruptcy, and presents a bankruptcy petition against *X*. But the alleged act of bankruptcy is one which can be committed only in England.<sup>2</sup> The Court has no jurisdiction to entertain the petition, or to adjudge *X* a bankrupt.

2. *X*, a Portuguese subject domiciled in Portugal, contracts a debt to *A* in England. *A* brings an action against *X* for the debt, and serves *X* with a writ. *X*, in consequence, leaves England for Portugal. *A* presents a bankruptcy petition against *X*. The alleged act of bankruptcy is that *X* has departed out of England with intent to defeat his creditors.<sup>3</sup> The mere return by *X* to his own country is not such an act of bankruptcy. The Court has no jurisdiction.<sup>4</sup>

3. The case is the same as in Illustration No. 2, except that the alleged act of bankruptcy is the remaining out of England, namely, in Portugal, by *X* with intent to defeat his creditors. *X* being an alien domiciled in Portugal, his being there is not such an act of bankruptcy. The Court has no jurisdiction.<sup>5</sup>

RULE 54.<sup>6</sup>—The Court has no jurisdiction to adjudge

<sup>1</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

<sup>2</sup> See Rule 59, clause (f), p. 294, *post*.

<sup>3</sup> See Rule 59, clause (d), p. 294, *post*.

<sup>4</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263. And see *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

Whether the Court may, subject to the effect of Rule 55, have jurisdiction to adjudge bankrupt, in respect of an act of bankruptcy committed *out of England*, an alien who is not domiciled in England, but is there at the time of the presentation of the bankruptcy petition? Contrast the language of Mellish, L. J., in *Ex parte Crispin*, with the language of Brett, L. J., in *Ex parte Blain*.



bankrupt any debtor who is not a debtor subject to the English bankruptcy law.

A debtor is not "a debtor subject to the English bankruptcy law" unless he either—

- (1) commits an act of bankruptcy in England, or,
- (2) being a British subject [or (semble) being domiciled in England], commits an act of bankruptcy out of England.

#### Comment.

An act of bankruptcy can be committed only by a "debtor."

The word "debtor," however, is a very wide one and must receive some qualification; for since the jurisdiction of the Court depends on the commission of an act of bankruptcy by a debtor, "unless we put some limit on the word 'debtor,' it will come to this, that any man who has never been in England, a subject of a foreign state, can be made a bankrupt in England because in a foreign state he has done a certain act."<sup>1</sup>

The true interpretation of the general word "debtor," in the Bankruptcy Act, is a debtor subject to the English bankruptcy law. "Sect. 4 of the Act of 1883 [which Rule 59 in effect "repeats] relates only to debtors who are subject, either by birth and natural allegiance or by temporary residence, to the English law."<sup>2</sup> "The whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects, or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction."<sup>3</sup> "The governing principle is, that all legislation is

<sup>1</sup> *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522, 531, judgment of Cotton, L. J. Though *Ex parte Blain* is decided under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), the principle of it applies to the Bankruptcy Act, 1883. See *In re Pearson*, [1892] 2 Q. B. (C. A.) 263.

Note, however, that the words of Cotton, L. J., refer to an Act which did not contain any provision corresponding to the Bankruptcy Act, 1883, s. 6 (d), which is reproduced in Rule 55, p. 283, *post*.

<sup>2</sup> *In re Pearson*, [1892] 2 Q. B. (C. A.) 263, 268, judgment of Fry, L. J.

<sup>3</sup> *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522, 526, judgment of James, L. J., cited *In re Pearson*, p. 268, in judgment of Fry, L. J.

"*primâ facie* territorial, that is to say, that the legislation of any country binds its own subjects, and the subjects of other countries who for the time bring themselves within the allegiance of the legislating power."<sup>1</sup>

"It must be borne in mind that bankruptcy is a very serious matter. It alters the status of the bankrupt. This cannot be overlooked or forgotten when we are dealing with foreigners, who are not subject to our jurisdiction. What authority or right has the Court to alter in this way the status of foreigners who are not subject to our jurisdiction? If Parliament had conferred this power in express words, then, of course, the Court would be bound to exercise it. But the decisions go to this extent, and rightly, I think, in principle, that, unless Parliament has conferred upon the Court that power in language which is unmistakeable, the Court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign Governments. Unless Parliament has used such plain terms as show that they really intended us to do that, we ought not to do it. That is the principle which underlies the decisions in *Ex parte Blain* and *In re Pearson*."<sup>2</sup>

In other words, the debtor to whom the bankruptcy law applies must be a debtor subject to the law of England.<sup>3</sup>

The term, however, "debtor subject to the English bankruptcy law," or "debtor subject to the law of England," is vague, and itself needs explanation. Its meaning is defined, or at any rate limited, by clauses 1 and 2 of our Rule.

1. Any debtor who (whether a British subject or an alien, whether domiciled in England or elsewhere) commits an act of bankruptcy in England is a debtor subject to the English bankruptcy law.<sup>4</sup>

<sup>1</sup> *Ex parte Blain*, p. 528, judgment of Brett, L. J., cited *In re Pearson*, p. 268, judgment of Fry, L. J.

<sup>2</sup> *In re A. B. & Co.*, [1900] 1 Q. B. (C. A.) 541, 544, 545, per Lindley, M. R.

<sup>3</sup> See *In re Pearson*, [1892] 2 Q. B. (C. A.) 263, 268, judgment of Fry, L. J.

<sup>4</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374, 379, *per curiam* (Compare *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522, 528, judgment of Brett, L. J.) Note particularly that in *Ex parte Crispin* the debtor was a Portuguese subject domiciled in Portugal, and was in Lisbon when the bankruptcy petition was presented. The debt was incurred in England, but *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509, shows that this was immaterial. The sole basis of jurisdiction was, therefore, the commission of an act of bankruptcy in England. It seems, then, clear that though the requirements of the Bankruptcy Act, 1883, s. 6 (1) (d), would make it impossible now to bring the debtor in *Ex parte Crispin* within the Bankruptcy

"The English Legislature has a right to make a bankruptcy statute which shall bind all its own subjects, and any foreigner who for the time is in England, and does something there which the statute forbids. As long as he is in England he is under the allegiance of the Queen of England, and in the power of the English Legislature. Therefore it has been held<sup>1</sup> [under the Bankruptcy Act, 1869], that if a foreigner, though not domiciled or permanently resident in this country, comes into England, and does or omits to do some act in England which the English Legislature has declared to be an act of bankruptcy, then, by reason of that act of bankruptcy done or suffered in England, he may be made a bankrupt in England."<sup>2</sup>

"It was argued," said Mellish, L. J., "that the word 'debtor' must be confined to debtors subject to the laws of England, and that as the appellant was a foreigner [viz., a Portuguese domiciled in Portugal], and had left England before a petition was presented against him, he had ceased to be subject to the laws of England, and no petition could be presented against him. We agree that the word 'debtor' must be construed to mean 'debtor properly subject to the laws of England;' but we are of opinion that it is the act of bankruptcy, and not the petition, which gives jurisdiction to the Court of Bankruptcy, and that if a foreigner comes to England, and contracts debts in England, and commits an act of bankruptcy in England, he thereby gives the Court of bankruptcy jurisdiction over him,"<sup>3</sup> *i.e.*, becomes a debtor subject to the English bankruptcy law.<sup>4</sup>

Act, yet that he is a debtor within sect. 4. The principle of *Ex parte Crispin*, in short, still holds good, and the words of Mellish, L. J., in *Ex parte Pascal* (1876). 1 Ch. D. (C. A.) 509, 512, "It was decided in *Ex parte Crispin* that "if a foreigner comes to England and contracts debts, and commits an act of "bankruptcy in England, he can be adjudicated a bankrupt," are to be taken in their full width, and apply to an alien who is not in England when the petition is presented. But they must, of course, be taken subject to the effect of the Bankruptcy Act, 1883, s. 6 (d), *i.e.*, of Rule 55, *post*.

<sup>1</sup> See *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509.

<sup>2</sup> *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522, 528, judgment of Brett, L. J. Such a foreigner could not in general be made a bankrupt under the Bankruptcy Act, 1883, as he would probably not fulfil the requirements of the Bankruptcy Act, 1883, s. 6 (d), embodied in Rule 55, *post*. Still, he would be a debtor subject to the English bankruptcy law, and therefore liable to be made a bankrupt if he satisfied the requirements of Rule 55, *e.g.*, by having ordinarily resided in England within a year before the presentation of the petition.

<sup>3</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374, 379, *per curiam*. This case was decided under the Bankruptcy Act, 1869. See note 4, p. 280, *ante*, and Rule 55, *post*.

<sup>4</sup> Compare Rule 57 as to jurisdiction to make a debtor bankrupt on his own petition.

2. Any debtor who, being a British subject [or (*semble*) who, being domiciled in England], commits an act of bankruptcy out of England, is a debtor subject to the English bankruptcy law.<sup>1</sup>

It is pretty clear that the word "debtor" includes a British subject who commits an act of bankruptcy out of England. "As regards an Englishman, a subject of the British Crown, it is not necessary," says Cotton, L. J., "that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act by reason of his being a British subject;"<sup>2</sup> for "the English Legislature has a right to make a bankruptcy statute which shall bind all its own subjects, and any foreigner who for the time is in England and does something there which the statute forbids."<sup>3</sup>

It appears probable further, though not certain, that the same principle applies to an alien domiciled in England.

"All the authorities," says Brett, L. J., "have held that it is necessary that the act of bankruptcy should have been committed in England, if the person against whom the statute is invoked is a foreigner who is not domiciled in England."<sup>4</sup> These words suggest the conclusion that an alien who is domiciled in England is a "debtor" under the Bankruptcy Act, even though the act of bankruptcy is committed in a foreign country.

The terms of Rule 54 are simply negative. The Court has no jurisdiction to adjudicate bankrupt any debtor who is not a debtor subject to the English bankruptcy law within the terms of that Rule. But it is not the case that the Court has jurisdiction to adjudicate bankrupt every debtor who is a debtor subject to the English bankruptcy law.<sup>5</sup>

#### Illustrations.

1. X, a Portuguese domiciled in Portugal, contracts debts in England, where he has within a year before the presentation of a bankruptcy petition had a place of business. He is not in England, and has committed an act of bankruptcy out of England. The Court has no jurisdiction.<sup>6</sup>

<sup>1</sup> *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522, 528, 532.

<sup>2</sup> *Ibid.*, p. 532, judgment of Cotton, L. J.

<sup>3</sup> *Ibid.*, p. 528, judgment of Brett, L. J.

<sup>4</sup> *Ibid.*

<sup>5</sup> See, especially, Rule 55, and compare *In re Pearson*, [1892] 2 Q. B. (C. A.) 263.

<sup>6</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374; *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263.

2. *X* and *Y*, American citizens, resident in America, have not come to England, but they have in England a place of business which they carry on through their agent *N*, and they have property in England. They, through *N*, incur debts in England to *A*, a creditor, resident in England. They then execute in the United States a deed of assignment of all their property to *T*, in trust, to pay their debts. *A* presents a petition for receiving order. The Court has no jurisdiction.<sup>1</sup>

3. *X*, an alien, incurs a debt in England. He then goes to and resides in France. He returns for a temporary purpose to England. He there commits an act of bankruptcy. The jurisdiction of the Court is not excluded by Rule 54,<sup>2</sup> *i.e.*, *X* is a debtor subject to the law of England.

RULE 55.<sup>3</sup>—The Court has no jurisdiction (at any rate on a bankruptcy petition being presented by a creditor) to adjudge bankrupt any debtor unless the debtor either—

- (1) at the time of the presentation of the petition is domiciled in England,<sup>4</sup> or
- (2) within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England.<sup>5</sup>

Provided that where there is jurisdiction to commit a judgment debtor under the Debtors Act, 1869, s. 5, the Court has jurisdiction even though he is an alien, and—

<sup>1</sup> *Cooke v. Charles A. Vogeler Co.*, [1901] A. C. 102; same case as *In re A. B. & Co.*, [1900] 1 Q. B. (C. A.) 541. The want of jurisdiction rests on two grounds:—(1) That the person attempted to be made bankrupt is not a debtor subject to the English bankruptcy law; (2) That “an act of bankruptcy must be a personal act or default, and it cannot be committed through an agent, nor by a firm as such.” *Cooke v. Charles Vogeler Co.*, [1901] A. C. 109, judgment of Halsbury, Ch.

<sup>2</sup> It may be excluded under Rule 55.

<sup>3</sup> Bankruptcy Act, 1883, s. 6 (d).

<sup>4</sup> *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418.

<sup>5</sup> *In re Heeguard* (1889), 24 Q. B. D. (C. A.) 71, with which compare *Ex parte Breull* (1880), 16 Ch. D. (C. A.) 484, and *In re Williams* (1873), L. R. 8 Ch. 690, which are decided under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 59; Bankruptcy Rules, 1870, rr. 17, 61. As to meaning of words “carry on business,” under Mayor’s Court Extension Act, 1857 (20 & 21 Vict. c. clvii.), s. 12, see *Lewis v. Graham* (1888), 20 Q. B. D. 780; *Graham v. Lewis* (1888), 22 Q. B. D. (C. A.) 1.

- (a) is not domiciled in England, and
- (b) has not ordinarily resided, or had a dwelling-house or place of business, in England.<sup>1</sup>

### Comment.

A debtor may be made a bankrupt either on the petition of a creditor or on the petition of the debtor himself.<sup>2</sup>

The Court has (at any rate on the petition of a creditor<sup>3</sup>) no bankruptcy jurisdiction over any debtor who, as to local connection with England, does not fulfil one or more of the conditions laid down in Rule 55.<sup>4</sup>

These conditions may, any or all of them, be fulfilled at the same time. They are, however, entirely distinct, and, as far as Rule 55 goes, the jurisdiction of the Court is not excluded if the debtor fulfils any one of them.

*As to domicile and ordinary residence.*—The term “domiciled” is in this rule used in its strict technical sense,<sup>5</sup> and the burden of proving what is a debtor’s domicile lies *prima facie* upon the creditor.<sup>6</sup> The difference between “domicil” and “ordinary residence,” and therefore the meaning of the words “ordinarily resided,” has been already treated of.<sup>7</sup> It is of great importance, however, to bear in mind that a debtor may be domiciled where he does not reside, and may ordinarily reside where he is not domiciled, and that “ordinary residence”<sup>8</sup> means more than mere temporary presence in England.<sup>9</sup>

*As to dwelling-house.*—The word “dwelling-house” is not to be taken in a very strict sense. It includes, for example, rooms which a person has taken as lodgings in a house of which part is retained by his landlord.

<sup>1</sup> See Bankruptcy Act, 1883, s. 103, sub-s. 5; *In re Clark*, [1896] 2 Q. B. (C. A.) 476; [1898] 1 Q. B. (C. A.) 20.

<sup>2</sup> See Bankruptcy Act, 1883, ss. 5—8, and Rules 56, 57, *post*.

<sup>3</sup> Compare Rule 57, and comment thereon, p. 291, *post*.

<sup>4</sup> Bankruptcy Act, 1883, s. 6 (d).

<sup>5</sup> *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418; *Ex parte Langworthy* (1887), 3 Times L. R. 544.

<sup>6</sup> *Ex parte Barne* (1886), 16 Q. B. D. (C. A.) 522.

<sup>7</sup> See pp. 229, 230, *ante*.

<sup>8</sup> *Conf. Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617, and *In re Patience* (1885), 29 Ch. D. 976.

<sup>9</sup> Compare *Ex parte Gutierrez* (1879), 11 Ch. D. (C. A.) 298, and *In re Hecquard* (1889), 24 Q. B. D. (C. A.) 71; and see p. 83, note 1, and contrast Rule 83, *Case 1*, p. 361, *post*.

The debtor must, however, have *exclusive* possession of the rooms;<sup>1</sup> and as a person may "ordinarily reside" in England, *e.g.*, at different hotels for a year, without having a dwelling-house there, so he may (it is submitted) have a dwelling-house in England without ordinarily residing there. X, for example, is an English nobleman domiciled in France. He has a house of his own in London, and keeps servants in it, so that he can at any moment inhabit it. He has lived there for only three days, or not at all, during a year. He has not during that year "ordinarily resided" in London, but he has, it would seem, had a dwelling-house there.<sup>2</sup>

*As to place of business.*—This, again, is a different thing from a dwelling-house. A man may have a place of business at an hotel if he keeps a room and transacts business there, even though he never sleeps or resides at the hotel;<sup>3</sup> and possibly, if X keeps a place of business in London occupied only by an agent, this may suffice to render X in so far liable to the bankruptcy jurisdiction of the Court.<sup>4</sup>

A distinction between "domicil" and the other kinds of local connection which are conditions of jurisdiction in bankruptcy should be noted. The debtor must possess an English domicil *at the time when the petition is presented*. He must "ordinarily reside," or have a "dwelling-house," &c., not at the time of the presentation of the petition, but at *some period within the year (not, be it observed, for the year) before the date when the petition is presented*. This difference may be thus exemplified: A bankruptcy petition is presented against X on the 1st January, 1896. He was domiciled in England up to the 1st July, 1895, but since that date has acquired a French domicil. The Court has no jurisdiction. A petition is presented against Y on the 1st January, 1896. At that date he is and has been residing for nearly six months in France, but up to and during June, 1895, he was ordinarily residing in England. In this case the Court has jurisdiction.

The terms of Rule 55, as of the enactment on which it is

<sup>1</sup> *In re Heequard* (1889), 24 Q. B. D. (C. A.) 71.

<sup>2</sup> See *In re Nordenfellt*, [1895] 1 Q. B. (C. A.) 151. Hence it would seem that a man who has never for years actually resided in England may possibly be held to have a dwelling-house there, as where X, who had not been in England for five years, keeps his house in London, in which he had once resided, in such a condition as to servants, furniture, &c., that he could at any moment live there. *Ibid*.

<sup>3</sup> See *In re Heequard* (1889), 24 Q. B. D. (C. A.) 71.

<sup>4</sup> But see *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522.

grounded,<sup>1</sup> are purely negative. They determine certain cases in which the Court has no jurisdiction; they do not determine the cases in which the Court has jurisdiction.<sup>2</sup>

*As to the proviso.*—This proviso applies to cases in which the jurisdiction of the Court would otherwise be excluded by Rule 55. In order that the proviso may apply the following conditions must exist:—

- (1) The debtor must be a debtor subject to the law of England.<sup>3</sup>
- (2) The creditor must make application to the Court for the debtor's committal to prison under the Debtors Act, 1869, s. 5.
- (3) The case must be one in which the Court has power to commit.

In these circumstances the Court may, instead of committing the debtor, decline to commit the debtor, and instead exercise its bankruptcy jurisdiction and make a receiving order against the debtor under which the Court has jurisdiction to adjudge him bankrupt.

#### Illustrations.

1. *X's* domicile of origin is Scotch.<sup>4</sup> He has left Scotland, but has not acquired a domicile of choice elsewhere. He owes debts to creditors in England, and is staying for a few days at an hotel in London on his way to France. *A* presents a bankruptcy petition against *X*. The Court has no jurisdiction to adjudge *X* a bankrupt.<sup>5</sup>

2. *X* is not domiciled in England, but during the whole of 1894 he resides in London. On the 1st January, 1895, he ceases to reside in England and goes and resides in France, and from that

<sup>1</sup> Bankruptcy Act, 1883, s. 6, sub-s. 1 (d).

<sup>2</sup> “We are asked to say that in any case to which the negative words of . . . [the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d)] do not apply the Court has jurisdiction. I think such a conclusion would be monstrous. The negative words of “sect. 6 do not imply, that, in every case to which they do not apply, the law of “bankruptcy applies.” *In re Pearson*, [1892] 2 Q. B. (C. A.) 263, 269, judgment of Fry, L. J. This case also shows that *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522, applies to the Act of 1883.

<sup>3</sup> *In re Clark*, [1896] 2 Q. B. (C. A.) 476.

<sup>4</sup> See as to domicile of choice and domicile of origin, pp. 103—119, *ante*.

<sup>5</sup> Compare *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418; *In re Heequard* (1889), 24 Q. B. D. (C. A.) 71. It is assumed in these illustrations that the debtor has committed an act of bankruptcy in England.



date has no place of business in England. On the 2nd January, 1896, *A*, a creditor, presents a bankruptcy petition against *X*. The Court has no jurisdiction.<sup>1</sup>

3. *X* is not domiciled in England, and has never had a place of business in England. During the whole of the year 1894 he ordinarily resides in London. On the 1st of January, 1895, he ceases to reside in London and settles in France where he acquires a domicile. During the course of 1895, he occasionally visits London, staying at an hotel or with friends for a few days at a time. On the 2nd January, 1896, *A*, a creditor, presents a bankruptcy petition against *X*. The Court has no jurisdiction.<sup>2</sup>

4. *X* is an Englishman, but is not domiciled in England. He has never been ordinarily resident in England, or had a dwelling-house or place of business there. He is in England for a temporary purpose, and staying for a short time at an hotel in London. He contracts in England a debt to *A* of 1,000/. He makes in London a conveyance of his property to a trustee for the benefit of his creditors generally. *A* presents a bankruptcy petition against *X*. The Court has no jurisdiction.<sup>3</sup>

5. *X* is an alien. He incurs a debt in England to *A*, who recovers judgment in England against him for 1,000/. In 1906 *A* is residing in France, and has not ordinarily resided or had a dwelling-house or place of business in England within the preceding year. He returns to England in order to pay a short visit to a friend. The Court has, in the circumstances, jurisdiction to commit him to prison as a judgment debtor under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5. The Court has jurisdiction to adjudge *X* a bankrupt.<sup>4</sup>

<sup>1</sup> See note 5, p. 286.

<sup>2</sup> *X*, though he has been in England during the year, has not ordinarily resided or had a dwelling-house or place of business in England.

<sup>3</sup> This appears strictly to follow from the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d). Contrast *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509, decided under the Bankruptcy Act, 1869.

<sup>4</sup> This is an illustration of the proviso, and is the result of the combined effect of the Debtors Act, 1869, s. 5, and the Bankruptcy Act, 1883, s. 103, sub-s. 5. Compare *In re Clark*, [1896] 2 Q. B. (C. A.) 476; [1898] 1 Q. B. (C. A.) 20, which in effect decides two things: (1) That an alien who has incurred a debt in England and then goes abroad, leaving the debt unpaid, becomes on returning to England a debtor subject to the English bankruptcy law. (2) That where a Court has a right to commit a judgment debtor under the Debtors Act, 1869, s. 5, it has also jurisdiction to make him a bankrupt even though, under the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d), a petition in bankruptcy could not be presented against him. Compare Westlake, p. 158.

## (B) WHERE COURT HAS JURISDICTION.

(a) *On Creditor's Petition.*

RULE 56.<sup>1</sup>—Subject to the effect of Rules 54 and 55, the Court, on a bankruptcy petition being presented by a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt)<sup>2</sup> who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the Court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England,<sup>3</sup>  
or
- (2) by the absence of the debtor from England at the time of the presentation of the petition,<sup>4</sup>  
or
- (3) by the fact that either the creditor or the debtor is an alien.<sup>5</sup>

**Comment.**

The exercise of the Court's bankruptcy jurisdiction is to a certain extent discretionary. The Court may, on the petition of a creditor or of a debtor, decline to exercise jurisdiction which it undoubtedly possesses. Such refusal, for example, may be based on the ground that the debtor has been made bankrupt in another country,<sup>6</sup> or

<sup>1</sup> See Bankruptcy Act, 1883, ss. 4, 6, and 20.

<sup>2</sup> There are other conditions as to the jurisdiction of the Court with which these Rules are not concerned, viz., that the debt owing to the petitioning creditor or creditors must amount to fifty pounds; that it must be a liquidated sum payable immediately or at some future time (see Bankruptcy Act, 1883, s. 6). Nor are these Rules concerned either with the steps which must be taken before a debtor can be adjudged bankrupt (see Bankruptcy Act, 1883, s. 20), or with the question whether proceedings should be taken in the High Court or in a County Court. (Bankruptcy Act, 1883, ss. 92, 99.)

<sup>3</sup> See Baldwin, 9th ed., pp. 61, 62; *Ex parte Paseal* (1876), 1 Ch. D. (C. A.) 509, 512, 513, judgment of James, L. J.

<sup>4</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374. See Bankruptcy Rules, 1883, r. 148.

<sup>5</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

<sup>6</sup> *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816. Compare *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716.

generally on the existence of “any of those equitable considerations which have induced the Court . . . to say that, although the legal requisites to an adjudication were in all respects perfect, it was not equitable that the bankruptcy should proceed.”<sup>1</sup> “It is not necessary,” says Lord Justice James, “for us to say that in every case the words of [the Bankruptcy Act, 1869], section 8,<sup>2</sup> “shall be adjudged bankrupt,”<sup>3</sup> make the adjudication so clearly *ex debito justitiæ* that the Court has no discretion in the matter. The Chief Judge has pointed out that, notwithstanding those words, the Court retains its old jurisdiction to refuse to make a man bankrupt for an improper purpose, and to annul an adjudication when the justice and the convenience of the case require it.”<sup>4</sup>

The jurisdiction of the Court is, as already pointed out, based, not on the petition, but on the commission of an act of bankruptcy by a debtor subject to the English bankruptcy law.<sup>5</sup> Some circumstances, therefore, such for example as the place where the debt is contracted, which might *prima facie* appear to affect the jurisdiction of the Court, are irrelevant. These circumstances are enumerated in clauses 1 to 3 of our Rule.

But though the fact that the debtor or the creditor is an alien does not, if an act of bankruptcy has been committed, affect the jurisdiction of the Court, the nationality, or even the residence, of the debtor may affect the question whether the debtor has committed an act of bankruptcy. Thus the departure from England of an Englishman domiciled in England may be an act of bankruptcy within Rule 59, clause (d), where the departure from England of a foreigner, whether an alien or not, whose home is in a foreign country, would not be an act of bankruptcy.<sup>6</sup>

### Illustrations.

1. X, a Portuguese domiciled in Portugal, contracts a debt<sup>7</sup> to A in England. He commits an act of bankruptcy in England,

<sup>1</sup> *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716, 719, judgment of Bacon, C. J.

<sup>2</sup> With which compare Bankruptcy Act, 1883, ss. 7, 8, 20.

<sup>3</sup> The actual words are, “the Court shall adjudge the debtor to be bankrupt.”

<sup>4</sup> *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716, 723, judgment of James, L. J. See *Re Bond* (1888), 21 Q. B. D. 17; *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640; *Ex parte Gibson* (1865), 34 L. J. (Bankruptcy) 31, 32.

<sup>5</sup> See pp. 278–282, *ante*.

<sup>6</sup> See *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

<sup>7</sup> It is assumed in these illustrations that the debt amounts to at least 50l.

where he has been ordinarily resident up to the time of committing the act of bankruptcy. *X* then leaves England for Portugal. *A*, within three months after the commission of the act of bankruptcy by *X*, presents a bankruptcy petition against *X*, grounded on the act of bankruptcy. *X*, at the time when the petition is presented, is resident in Portugal. The Court has jurisdiction to adjudge *X* bankrupt.<sup>1</sup>

2. *X* is a Peruvian citizen domiciled in Peru, where he contracts a debt to *A*, an Italian subject. *X* comes to reside in England, and resides there ordinarily for three months. *X* commits an act of bankruptcy in England. *A*, within a year from the time when *X* has ordinarily resided in England, and within three months from the commission of the act of bankruptcy, presents a petition against him grounded on such act. The Court has jurisdiction.<sup>2</sup>

3. *X*, an Irishman domiciled in Ireland, carries on business at Dublin, and also at Liverpool, where he has a house of business. He commits an act of bankruptcy in England. A bankruptcy petition is immediately presented by a creditor against *X*. The Court has jurisdiction.<sup>3</sup>

4. *X* is an American citizen and carries on business as a financial agent. His wife and family reside at Brussels. In November, 1886, *X* takes a room at the Hotel Metropole, Charing Cross. He keeps the room until the time when a bankruptcy petition against him is presented. During the period for which he takes the room he addresses his letters from the hotel, and goes backwards and forwards from the hotel. Under these circumstances *X* ordinarily resides in England. *X* commits an act of bankruptcy in England. *A*, within three months after the commission of the act of bankruptcy, presents a bankruptcy petition. The Court has jurisdiction.<sup>4</sup>

<sup>1</sup> Compare *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

In *Ex parte Crispin* the Court had no jurisdiction, because under the circumstances there was no evidence of *X* having committed an act of bankruptcy.

<sup>2</sup> Compare *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509.

In *Ex parte Pascal* the debtor had, perhaps, not been ordinarily residing in England. The case was decided under the Bankruptcy Act, 1879, and (*semble*) would, under the circumstances, have been otherwise decided if it had come under the Bankruptcy Act, 1883. It, however, distinctly decides that the fact of the parties being aliens does not affect the jurisdiction of the Court.

<sup>3</sup> *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716.

<sup>4</sup> In *re Norris* (1888), 4 Times L. R. 452. Whether *X*'s room at the hotel also constitutes a place of business depends upon the way in which it is used.

(b) *On Debtor's Petition.*

RULE 57.<sup>1</sup>—The Court has, on a bankruptcy petition being presented by a debtor, alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt.

Comment.

It will be observed that in this Rule no reference is made to the restrictions on the jurisdiction of the Court which are stated in Rules 53 to 55.<sup>2</sup> The omission is intentional.

A debtor who presents a bankruptcy petition against himself *ipso facto* commits an act of bankruptcy,<sup>3</sup> and commits it in England.<sup>4</sup> The requirements, therefore, of Rules 53 and 54 are necessarily satisfied, or, in other words, the restrictions on the jurisdiction of the Court contained in these Rules cannot apply.

Rule 55 applies (it is conceived) only to the case where a debtor is to be made bankrupt on the petition of a creditor. The jurisdiction, therefore, of the Court to adjudge a debtor bankrupt on his own petition is unaffected by the restrictions stated in that Rule, or, to put the same thing in other words, the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d), on which Rule 55 is grounded, applies only where a debtor is to be made bankrupt on a creditor's petition. If this view of the bankruptcy law be correct, the Court has, in strictness, jurisdiction to make any debtor bankrupt on his own petition. The Court, however, may, and no doubt would, decline to exercise this jurisdiction whenever it would work injustice, and the absence of all local connection with England on the part of a petitioning debtor would be a strong reason for the Court's refusing, on grounds of equity and fairness, to make him bankrupt.<sup>5</sup>

<sup>1</sup> Bankruptcy Act, 1883, ss. 5, 8, 20.

<sup>2</sup> See pp. 277—284, *ante*.

<sup>3</sup> See Rule 59, clause (f), p. 294, *post*.

<sup>4</sup> See p. 280, *ante*.

<sup>5</sup> It has been suggested, however, by Mr. Westlake that the jurisdiction of the Court is subject, when a petition is presented by a debtor, to the same limitations which are imposed on the Court under the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d), when a petition is presented by a creditor. "As conditions for the commencement of proceedings by a creditor's petition, they express the legislator's view of the debtors who ought to be subject to bankruptcy in England in the interest of creditors; and it would be difficult to show that a debtor who is neither domiciled in this country, nor within the past year has ordinarily resided or had a dwelling-house or place of business in it, has any claim on his

## Illustrations.

1. *X*, an Englishman domiciled in England, incurs debt in France, and presents a petition alleging that he is unable to pay his debts. The Court has jurisdiction to adjudge *X* a bankrupt.<sup>1</sup>

2. *X* is a British subject domiciled at Melbourne, Australia. He has at no time been ordinarily resident or had a dwelling-house or place of business in England. He has incurred debts both in Australia and in England. *X* presents a petition alleging that he is unable to pay his debts. Whether the Court has jurisdiction to adjudge *X* a bankrupt?<sup>2</sup> *Seem*, the Court has jurisdiction, but may refuse to exercise it.

RULE 58.<sup>3</sup>—The jurisdiction of the Court to adjudge bankrupt a debtor on the petition of a creditor, or on the petition of the debtor, is not taken away by the fact of the debtor being already adjudged bankrupt by the Court of a foreign country, whether such country do or do not form part of the British dominions.

## Comment.

A debtor's bankruptcy, under the law of a foreign country, does not deprive the English Court of jurisdiction to adjudge him a bankrupt. But the fact of his having been made bankrupt in a foreign country (*e.g.*, Scotland or France) may be a reason against the Court's exercising its jurisdiction. Thus, where the debtor had already been made bankrupt in Scotland, the law was laid down as follows: "About the jurisdiction to make an adjudi-

"own account to what may be the benefit of an English bankruptcy. In previous stages through which the English bankrupt laws have passed, it has been possible for debtors who have not fallen within the above conditions to be adjudicated bankrupt; but it may fairly be presumed that, if in 1883 Parliament had intended the continuance of any such possibility, it would have enabled a creditor to avail himself of it." Westlake (4th ed.), pp. 159, 160, s. 128.

This reasoning, though forcible, is not conclusive, and it is safest to avoid system of interpretation which on general grounds reads into an Act of Parliament limitations not to be found in the words of the statute. Compare *In re Pearson*, 1892] 2 Q. B. (C. A.) 263.

<sup>1</sup> Bankruptcy Act, 1883, ss. 5, 8.

<sup>2</sup> But see Westlake, p. 159.

<sup>3</sup> *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716; *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816; *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640.

“ cation I have no doubt; *Ex parte McCulloch*<sup>1</sup> settles that. Of course there must be some reason for exercising it, and the mere existence of a bankruptcy in Scotland or in Ireland would, *prima facie*, be a reason for not exercising it. Here the Scotch sequestration is not closed; it does not appear that there are any subsequent debts, or any assets in England, and there is no reason for exercising the jurisdiction. . . . There ought not to be an adjudication.”<sup>2</sup>

### Illustrations.

1. *A* carries on business at Monaghan in Ireland and at Liverpool in England. On the 3rd May a bankruptcy petition is presented against him in England. On the 4th May he is adjudicated bankrupt on his own petition in Ireland. On the 5th May the English Court has jurisdiction to adjudicate him bankrupt in England though the Irish bankruptcy is known to and brought before the attention of the Court.<sup>3</sup>

2. July 27, 1881, there is an unclosed sequestration against *X* in Scotland. In 1882 *A* in England presents a bankruptcy petition against *X*. The Court has jurisdiction to adjudge *X* bankrupt, though it is a matter of discretion whether the Court shall or shall not exercise its jurisdiction.<sup>4</sup>

### (C) WHAT ACTS ARE ACTS OF BANKRUPTCY.

RULE 59.<sup>5</sup>—A debtor commits an act of bankruptcy in each of the following cases [and in no other case]:—

- (a) If, in England, or *elsewhere*, he makes a conveyance or assignment of [the whole of<sup>6</sup>] his property to a trustee or trustees for the benefit of his creditors generally.

<sup>1</sup> (1880), 14 Ch. D. (C. A.) 716.

<sup>2</sup> *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816, 818, per Jessel, M. R.

<sup>3</sup> *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716. Though the English Court has jurisdiction, *X*'s whole assets have already vested in the assignee under the Irish bankruptcy. See Rules 109, 113, pp. 429, 434, *post*.

<sup>4</sup> *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816.

<sup>5</sup> This Rule follows in substance the words of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1. The words in brackets are added. The meaning of the term, “the Court,” as interpreted in Rule 53, p. 277, *ante*, should be borne in mind.

<sup>6</sup> See *Ex parte Crispin* (1873), L. R. 8 Ch. 374; and Baldwin (9th ed.), pp. 93, 94.

- (b) If, in England, or *elsewhere*, he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.
- (c) If, in England, or *elsewhere*, he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon, which would [under any Act of Parliament<sup>1</sup>] be void as a fraudulent preference if he were adjudged bankrupt.
- (d) If, with intent to defeat or delay his creditors, he does any of the following things, namely, departs out of England, or, being out of England, remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.
- (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.
- (f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.
- (g) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or by leave of the Court elsewhere, a bankruptcy notice under the Bankruptcy Act, 1883, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven

<sup>1</sup> The words of Bankruptcy Act, 1883, are, "this or any other Act."



days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained.

Any person who is for the time being entitled to enforce a final judgment is to be deemed a creditor who has obtained a final judgment within the meaning of this Rule.

- (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.<sup>1</sup>

#### Comment.

Every act which can constitute an act of bankruptcy is enumerated in this Rule.

For the determination whether a given transaction does constitute an act of bankruptcy within this Rule, the following general considerations are of importance:—

1. Any transaction which is to constitute an act of bankruptcy must, unless the contrary is apparent from the terms of this Rule, have occurred *in England*.<sup>2</sup>

2. Of the acts of bankruptcy enumerated in this Rule, some, *e.g.*, those included in clauses (a), (b), and (c), can be committed either in England or in any other country; others, *e.g.*, those included in clauses (e) and (f), must be committed in England; and some, it would seem, must, as to part of the transaction constituting the act of bankruptcy, be committed in England, but may, as to other portions of it, be committed out of England.

<sup>1</sup> See the Bankruptcy Act, 1883, s. 4, sub-s. 1 (h); *In re Crook* (1890), 24 Q. B. D. (C. A.) 320; *Crook v. Morley*, [1891] A. C. 316.

<sup>2</sup> Compare Baldwin (9th ed.), p. 93, citing *Ingliss v. Grant* (1794), 5 T. R. 530.

Such would appear to be the case as to some at any rate of the acts included in clauses (d) and (g).

3. The dealings with a debtor's property which constitute an act of bankruptcy under clauses (a), (b), and (c) may take place either in England "or elsewhere." But it has been suggested or laid down by very high authority that a conveyance, or the like, made out of England must, if it is to be an act of bankruptcy, be a conveyance "which is to operate according to English law."<sup>1</sup>

To this suggested proviso or limitation it is hard to attach a very definite meaning. The proviso is (it is conceived) intended to exclude from the character of acts of bankruptcy acts done abroad by a foreigner not domiciled in England, and not intended to operate at all according to English law, *i.e.*, not intended to have any effect on property in England.<sup>2</sup>

4. Whether a debtor does or does not commit an act of bankruptcy under clause (d), *e.g.*, by departing out of England or remaining out of England, may depend upon the answer to the question whether he is or is not an Englishman living in England; for the words of the clause "imply that the person who remains "out of England has his home or place of business in England, "and cannot reasonably be held to apply to the case of a foreigner "remaining in his own home."<sup>3</sup>

<sup>1</sup> See *Ex parte Crispin* (1873), L. R. 8 Ch. 374, 380, judgment of Court delivered by Mellish, L. J.

<sup>2</sup> "The words," writes Mr. Baldwin, "'or elsewhere' are intended to include "the case of a conveyance executed abroad by a domiciled Englishman temporarily "abroad, which is intended to operate according to English law; they have no "application to a conveyance abroad, of all property wherever situate, executed "by a foreigner domiciled in his own country." (Baldwin, pp. 105, 106, citing *Ex parte Crispin* (1873), L. R. 8 Ch. 374.) But this statement of the law may possibly be a little too narrow. X is a Frenchman domiciled in France, but ordinarily resident in England; he possesses a large amount of goods in both countries. He executes at Paris a conveyance of all his property to A on behalf of his creditors. Has X committed an act of bankruptcy? If he has, Mr. Baldwin's language is too narrow. Suppose, again, that X, a Frenchman domiciled in France, but ordinarily resident in England, has real and personal property in England, but none in France. X at Paris executes a conveyance to A of all his property for the benefit of X's creditors. It would be difficult to contend that this is not an act of bankruptcy committed elsewhere than in England, yet it is not an act of bankruptcy within Mr. Baldwin's statement of the law. It is, however, quite a tenable position that a foreigner domiciled abroad must be in England in order to commit an act of bankruptcy available for adjudication, and that the words "or elsewhere," whenever they occur in connection with an act of bankruptcy, must be read in this sense.

<sup>3</sup> *Ex parte Crispin* (1873), L. R. 8 Ch. 374, 380, judgment of Court delivered by Mellish, L. J. The word "foreigner" covers both an alien and a person who, though not an alien, belongs to any other country than England, *e.g.*, a Canadian.

5. An act of bankruptcy must be a personal act or default, and it cannot be committed through an agent unless the agent is authorised to do the particular act, nor by a firm as such.<sup>1</sup> Thus *X* is a Chilian subject, who has never been in England, but he is a member of an English firm which trades and contracts debts in England. An action is brought against the firm, judgment is obtained, and execution is issued, under which the goods of the firm are seized and sold. The seizure and sale of the goods is not an act of bankruptcy on the part of *X*.<sup>2</sup>

## II. WINDING-UP OF COMPANIES.<sup>3</sup>

### (A) WHERE COURT HAS NO JURISDICTION.

RULE 60.—The Court has no jurisdiction to wind up—

- (1) Any company registered in Scotland or in Ireland ;<sup>4</sup>
- (2) Any unregistered company having a principal place of business situate in Scotland or in Ireland, but not having a principal place of business situate in England ;<sup>5</sup>
- (3) Any unregistered foreign company which, though carrying on business in England, has no office in England ;<sup>6</sup>
- (4) Any unregistered company which does not fall within the Companies Act, 1862.<sup>7</sup>

<sup>1</sup> *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522.

<sup>2</sup> *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522.

<sup>3</sup> Lindley, *Company Law* (6th ed.), bk. iv. c. 1, ss. 1 and 2, pp. 828—841 ; Westlake (4th ed.), pp. 162, 163 ; Nelson, pp. 240, 241 ; Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 81, 199 ; and Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 1.

<sup>4</sup> Compare Companies Act, 1862, s. 81, which is repealed only as to England and Wales ; and Companies (Winding-up) Act, 1890, s. 1.

<sup>5</sup> Companies Act, 1862, s. 199, sub-s. 1. Note sect. 199 for the definition of an “unregistered company,” which means, speaking generally, any partnership, association, or company not registered under the Companies Act, 1862, and includes a foreign company formed under a foreign law (see *Reuss v. Bos* (1871), L. R. 5 H. L. 176 ; *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219), and further for the fact that a company may simultaneously have principal places of business in more than one part of the United Kingdom, e.g., both in England and in Scotland.

<sup>6</sup> *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219, 220.

<sup>7</sup> See Lindley, *Company Law* (6th ed.), pp. 837—841.

The term "the Court," in this Rule and in Rule 61, means any Court in England having jurisdiction to wind up a company under the Companies Act, 1862, and the Acts amending the same, and includes the High Court and any other Court in England having such jurisdiction.<sup>1</sup>

#### Comment.

1. *Registered in Scotland, &c.*—A company cannot be registered in more than one part of the United Kingdom, and jurisdiction to wind up a company registered in Scotland or in Ireland is given by the Companies Act to the proper Irish and Scotch Court exclusively.<sup>2</sup>

2. *Unregistered.—Principal place of business in Scotland, &c.*—An unregistered company is to be wound up in that part of the United Kingdom where its principal place of business is situate. Hence a company which has not its principal place of business in England, but has its principal place of business, *e.g.*, in Scotland, must be wound up by the Scotch Court. But a company may have a "principal place of business" at the same time in more than one part of the United Kingdom, *e.g.*, both in England and in Scotland. In this case the proper English and Scotch Court respectively have each jurisdiction to wind up the company.<sup>3</sup>

3. *Unregistered.—Foreign company without office, &c.*—A foreign unregistered company may carry on business in England through agents without having any English office of its own. In this case the Court has no jurisdiction to wind it up.

"The jurisdiction," says Pearson, J., "to wind up a company is a purely statutory one under the Companies Acts. . . . I am decidedly of opinion that the Act is confined to English companies, and foreign companies carrying on business in England with, so to speak, a residence of their own—a branch office—in this country. In the cases which have been cited<sup>4</sup> of orders made to wind up foreign companies, the companies had an office

<sup>1</sup> See Companies Act, 1890, s. 1. All the English Courts having jurisdiction to wind up a company are, for the purpose of these Rules, treated as if they were one Court.

<sup>2</sup> Companies Act, 1862, s. 81.

<sup>3</sup> See Rule 61, *post*; and Companies Act, 1862, s. 199, sub-s. 1.

<sup>4</sup> *Viz.*, *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517; *In re Matheson* (1884), 27 Ch. D. 225; *Reuss v. Bos* (1871), L. R. 5 H. L. 176.

“ in England, but that is not so in the present case. I have no jurisdiction at all.”<sup>1</sup>

4. *Unregistered.*—*Company not within Companies Act, 1862.*—“ The 199th section of the Companies Act, 1862, is expressed in terms sufficiently large to include all unregistered societies and corporations of whatever kind, consisting of more than seven members at the date of the petition, with the single exception of railway companies incorporated by Act of Parliament. But the general scope of the Winding-up Acts, and the mention of a place of business for the purpose of determining the Court which has jurisdiction to wind up unregistered companies, show that the Act only applies to unregistered societies and corporations of the nature of trading companies. There are, however, many corporations aggregate to which the winding-up provisions of the Companies Act, 1862, have no application; *e.g.*, municipal corporations, ecclesiastical corporations aggregate, and societies such as the Royal Society, incorporated by royal charter for the advancement of science.” So, again, the Winding-up Acts do not apply to ordinary clubs,<sup>3</sup> and the Court has no jurisdiction to wind up corporations or societies which do not come within the scope of the Winding-up Acts.

### Illustrations.

1. X is a Scotch banking company having an office and registered in Scotland, but also having an office in London and carrying on a large business in England. The Court has no jurisdiction to wind up the company.

2. X is an unregistered company having a principal place of business in Edinburgh and a subordinate place of business in London. The Court has no jurisdiction to wind up the company.<sup>4</sup>

3. X is a *société anonyme* for the carrying on of marine insurance. It is established at Genoa, and is authorised by a decree of the King of Italy. It is not registered under the Companies Act, 1862. It carries on business in Italy and also in England. The business in England is carried on by means of

<sup>1</sup> *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219—221, judgment of Pearson, J.

<sup>2</sup> Lindley, *Company Law* (6th ed.), p. 837.

<sup>3</sup> *Ibid.* p. 838.

<sup>4</sup> Companies Act, 1862, s. 299, sub-s. 1.

agents, and *X* has no branch office of its own in England. The Court has no jurisdiction to wind up the company.<sup>1</sup>

4. *X* is an ordinary club. The Court has no jurisdiction to wind it up.

### (B) WHERE COURT HAS JURISDICTION.

RULE 61.<sup>2</sup>—Subject to the effect of Rule 60, the Court has jurisdiction to wind up—

- (1) Any company registered in England;<sup>3</sup>
- (2) Any unregistered company having a principal place of business<sup>4</sup> or a branch office<sup>5</sup> in England.

#### Comment.

There are two classes of companies which, subject to certain limited exceptions, the Court has jurisdiction to wind up.

1. *Registered in England*.—The Court has jurisdiction to wind up a company registered in England, whether it be an English or a foreign company. The jurisdiction is not taken away by the fact that the company is formed to carry on business abroad, nor by the fact of its consisting of foreigners, nor by the consideration that the registrar might have rightly declined to register the company.<sup>6</sup> A company, moreover, which is capable of being registered at all, may be registered for the sole purpose of being wound up.<sup>7</sup>

2 *Unregistered and having a principal place of business, &c.*—An unregistered company which has a principal place of business in England is, though it may also have another principal place of business in Scotland or in Ireland, precisely within the terms of the Companies Act, 1862, s. 199, sub-s. 1, and the Court clearly has jurisdiction to wind it up.

Foreign companies not registered under the Act have been held to be within the provisions of the Companies Act, 1862, as to the

<sup>1</sup> *In re Lloyd Generalo Italiano* (1885), 29 Ch. D. 219.

<sup>2</sup> Lindley, *Company Law* (6th ed.), p. 834; Companies Act, 1862, ss. 79, 180, 196, 199.

<sup>3</sup> *Reuss v. Bos* (1871), L. R. 5 H. L. 176.

<sup>4</sup> The Companies Act, 1862, s. 199.

<sup>5</sup> *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517; *In re Matheson* (1884), 27 Ch. D. 225.

<sup>6</sup> *Reuss v. Bos* (1871), L. R. 5 H. L. 176.

<sup>7</sup> Lindley, *Company Law* (6th ed.), pp. 834, 835.

winding-up of unregistered companies,<sup>1</sup> and may be wound up by the Court if they possess branch offices of their own in England.

“ A company formed and registered abroad, and having a branch office in this country, but not registered here, may be ordered to be wound up under the Companies Act, 1862 ; and the fact that steps are being taken to wind up the company in the country in which the company is registered does not affect the jurisdiction of the English Court, though in such cases it is usual to make the winding-up ancillary to that in the country of its domicile. But the writer apprehends that it is not competent for any Court in this country to dissolve a corporate body created by a competent foreign authority ; and, therefore, that a foreign corporation cannot be wholly wound up and dissolved in this country. At the same time, if a foreign incorporated company were registered, the corporate body created by registration might be wound up and dissolved without any undue exercise of jurisdiction.”<sup>2</sup>

Where the jurisdiction to wind up a company exists, the exercise thereof is to a certain extent a matter of discretion, and the fact that an unregistered foreign company with a branch office here is being wound up in the foreign country, under the law of which it is constituted, may be a reason against winding it up here.

### Illustrations.

1. X is a company duly registered in England under the Companies Act, 1862. The subscribers to the articles of association are all foreigners resident abroad. The objects of the company are mainly the transaction of business abroad, and the company has in fact carried on little or no business in England. The Court has jurisdiction to wind up the company.<sup>3</sup>

2. X is a company formed for making a railway in Spain, and has a board of directors in Madrid and in London ; the *locale* of the company is to be Spain, and its affairs are to be regulated by Spanish law. It is registered in England. The Court has jurisdiction to wind up the company.<sup>4</sup>

<sup>1</sup> See *In re Matheson* (1884), 27 Ch. D. 225 ; *In re Commercial Bank of South Australia* (1886), 33 Ch. D. 174.

<sup>2</sup> Lindley, *Company Law* (6th ed.), p. 840.

<sup>3</sup> *In re General Co. for Promotion of Land Credit* (1870), L. R. 5 Ch. 363 ; *Reuss v. Bos* (1871), L. R. 5 H. L. 176.

<sup>4</sup> *In re Madrid, &c. Co.* (1849), 19 L. J. Ch. 260 ; 3 De G. & Sm. 127 ; *Re the Façtage Parisien* (1864), 34 L. J. Ch. 140.

3. *X* is an unregistered company having a principal place of business in London. The Court has jurisdiction to wind up the company.<sup>1</sup>

4. *X* is an unregistered company, having a principal place of business both in Edinburgh and in London. The Court has jurisdiction to wind up the company.<sup>2</sup>

5. An Anglo-Belgian company is constituted a *société anonyme*, with domicil at Brussels and a board of directors there and in London, where it has a branch office. The object of the company is to make a railway in Belgium. The Court has jurisdiction to wind up the company.<sup>3</sup>

6. *X* is a joint-stock company formed in India and incorporated by registration under Indian law. It has a principal place of business in India, but has a branch office and agent in England. The Court has jurisdiction to wind up the company.<sup>4</sup>

7. *X* is an unregistered joint-stock company, formed and having its principal place of business in New Zealand, but has a branch office, agent, assets, and liabilities in England. The Court has jurisdiction to wind up the company.<sup>5</sup>

8. *X* is a banking company incorporated and carrying on business in Australia, and is not registered in England, but has a branch office in London. The company has English creditors and assets in England. The Court has jurisdiction to wind up the company.<sup>6</sup>

<sup>1</sup> Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199.

<sup>2</sup> *Ibid.*

<sup>3</sup> Suggested by *Re Dendro Valley Co.* (1850), 19 L. J. Ch. 474.

<sup>4</sup> *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517.

<sup>5</sup> *In re Matheson* (1884), 27 Ch. D. 225.

<sup>6</sup> *In re Commercial Bank of South Australia* (1886), 33 Ch. D. 174.



CHAPTER IX.

JURISDICTION IN MATTERS OF ADMINISTRATION  
AND SUCCESSION.

RULE 62.—In this Digest, unless the context or subject-matter otherwise requires,

- (1) “Property”<sup>1</sup> means and includes:—
  - (i) any immovable;
  - (ii) any movable.
- (2) “Administrator” includes an executor.
- (3) “Personal representative” includes an administrator, and also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the property of the deceased by way of administration.
- (4) “Foreign personal representative” means the personal representative of the deceased under the law of a foreign country.
- (5) “Administration” means the dealing according to law with the property of a deceased person by a personal representative.
- (6) “Succession” means beneficial succession to the property of a deceased person.
- (7) “Grant” means a grant of letters of administration, or of probate of a will.
- (8) “English grant” means a grant made by the Court.

<sup>1</sup> See, for the definition of immovable and movable, and as to division of property into immovables and movables, and as to its relation to the division into realty and personalty, pp. 68, 74—77, *ante*. Compare, also, the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I. ss. 1—5, 25.

- (9) “Assets” means such property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with.

**Comment.**

(1) *Property*.—The division of property, or, in strictness, of the subjects of property or ownership, which is generally followed in this Digest, is the division into immovables and movables. With the different division of property followed by English lawyers into realty (or real property), and personalty (or personal property), we need not, for the purpose of this treatise, in general, concern ourselves. In some, however, of the Rules in this Digest, and certainly in the Rules which concern the jurisdiction of the High Court in matters of administration, it is necessary or convenient to keep in view the mode of division adopted by English law, and to understand clearly its relation to the division into immovables and movables; it is well also to keep before one’s mind the meaning of certain terms of English law, *e.g.*, land,<sup>1</sup> goods, and *choses in action*, which are closely connected with the division of property into real property and personal property.<sup>2</sup>

(2) *Administrator*.—Under English law, the representative of a deceased person, in respect of his property, is always either an “administrator,” *i.e.*, a person entitled to represent an intestate (or at any rate a deceased person who is not represented by an executor) or an “executor,” *i.e.*, a person appointed by the will of a testator to represent him in respect of his property, and to deal with such property in accordance with the terms of the will. Thus, according to the usual terminology of English law, an “administrator,” in the technical sense of the term, is opposed to an “executor.” For the purposes of this Digest, however, it is convenient to make the term “administrator” include an executor,

<sup>1</sup> Land “in the legal signification comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moores, waters, marishes, furses and heath. It legally includeth also all castles, houses and other buildings: for castles, houses, &c., consist upon two things, viz. *land* or ground, as the foundation, and structure thereupon; so as passing the land or ground, the structure or building, thereupon passeth therewith.” Co. Litt. 4 a; cited 1 Steph. Comm. (14th ed.), p. 93.

<sup>2</sup> Termed sometimes also “real estate” and “personal estate.” See, *e.g.*, Exception 1 to Rule 185, p. 673, *post*, where the language of the Wills Act, 1861 (24 & 25 Vict. c. 114), is followed.

and thus to give it a somewhat wider sense than it usually receives in English law books.

(3) *Personal representative*.—The term “personal representative” is here used in a very wide sense; it includes a person who, under any legal system, represents an intestate, or a testator, in regard to his property.

As applied, however, to England, it is equivalent to an administrator in the sense given to that term in this Digest.

(5) *Administration*, (6) *Succession*.<sup>1</sup>—The terms “administration” and “succession” are purposely so defined as to be applicable to foreign countries (*e.g.*, to France) no less than to England. The two things are essentially different, for the one means the dealing with a deceased person’s property according to law, the other the succeeding to it beneficially. And English law, in common with the systems which follow the law of England, emphasises the distinction between administration and beneficial succession.

“Administration”<sup>2</sup> means in England the dealing according to law with the property of an intestate, or testator, by the person who has authority under English law so to deal with it.

No one can fully represent the deceased, or has a right in all respects to deal with his property, *e.g.*, to distribute it, who has not obtained authority to do so from the Court.<sup>3</sup> If the deceased dies intestate,<sup>4</sup> the necessary authority is acquired by the proper person (*e.g.*, the intestate’s next of kin) obtaining from the Court a grant of letters of administration. If the deceased has made a will appointing an executor who consents to act, then the necessary authority is acquired by the executor obtaining from the Court probate of the will.<sup>5</sup> The duty of an administrator, including in

<sup>1</sup> Only those terms in Rule 62 are commented upon which need explanation.

<sup>2</sup> As to some ambiguities of the word “administration,” see language of Lord Selborne in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 504.

<sup>3</sup> Immediately on the owner’s death, if he dies intestate, the real property of the deceased vests in his heir (*John v. John*, [1898] 2 Ch. (C. A.) 573, 576; *In re Pawley*, [1900] 1 Ch. 58), and his personal property in “the judge of the Court of Probate” [now the Probate Division of the High Court] for the time being” (Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 19), and if he dies having made a will appointing an executor, then in the executor.

<sup>4</sup> Or, having made a will, has either appointed no executor, or has appointed an executor who declines to act.

<sup>5</sup> See Williams, *Executors* (10th ed.), p. 208. There is, of course, the difference that the authority of an administrator, in the restricted sense of the term, depends strictly on his having obtained letters of administration, whilst the authority of an executor depends ultimately, not upon his having obtained probate, but upon his appointment under the will; the probate is rather the recognition of an executor’s authority than the conferring of it. But this distinction is for our

that term an executor, is, it should be here remarked, to pay the duties and debts due from the property of the deceased intestate or testator, and, having done this, or, to use a popular expression, having "cleared" the estate, to hand over what remains to the person or persons entitled to succeed to it according to law.

"Succession" means the succeeding beneficially to the property of a deceased person, or, rather, to the distributable residue thereof, *i.e.*, to the portion which remains in the hands of the administrator after the estate has been cleared.

But, under English law, though administration is kept absolutely distinct from succession, there can be no succession to property without administration; for the possibility of dealing fully and legally with the property of an intestate or testator depends, as already pointed out, upon someone having obtained from the Court, in the form either of letters of administration or of probate, authority to deal with the property according to law, or, in other words, to administer it.

(7) *Grant*, (8) *English grant*.—The Court, as already pointed out, where the deceased person dies intestate, grants letters of administration, and, where he has made a will and appointed an executor who acts, grants probate. The word "grant," as used in these Rules, includes a grant of either kind. The expression "English grant," which is not a technical one, is used only for the sake of brevity, and to distinguish a grant made by the Court from a grant of administration or probate made by some foreign Court.

A grant is, in the usual course of things, made by the Court as the result of proceedings which are non-contentious, or, as they are technically called, in "common form."<sup>1</sup> But if the right to represent an intestate or testator is, or may be, disputed, it becomes the subject of an action, called a "probate action," and a grant is made by the Court as a result of such action.<sup>2</sup>

present purpose unimportant. No one, whether administrator or executor, can fully represent the deceased until he has obtained the authority or sanction of the Court by a grant, as the case may be, either of administration or of probate. Note, too, the necessity for taking out probate, &c., under the Stamp Act, 1815 (55 Geo. III. c. 184), s. 37.

<sup>1</sup> See Tristram & Coote, Prob. Prac. (11th ed.), pp. 1—253.

<sup>2</sup> A "probate action" (see R. S. C. Ord. LXXI. r. 1) is either (i) an action for determining which of two claimants is entitled to a grant of letters of administration; or (ii) for proving wills in solemn form of law; or (iii) for the revocation of probates or letters of administration. Compare Tristram & Coote, pp. 366—368, where the term "probate action" is used in rather a narrower sense. A probate action, which was formerly brought in the Court of Probate, must now be brought in the Probate Division of the High Court.

## (A) ADMINISTRATION.

RULE 63.<sup>1</sup>—The Court has jurisdiction to make a grant<sup>2</sup> in respect of the property<sup>3</sup> of a deceased person, either

- (1) where such property is locally<sup>4</sup> situate in England at the time of his death, or
- (2) where such property has, or the proceeds thereof have, become locally situate in England at any time since his death, and not otherwise.<sup>5</sup>

<sup>1</sup> Tristram & Coote, Prob. Prac. (11th ed.), pp. 355—357; *Preston v. Melville* (1840), 8 Cl. & F. 1; *Enohun v. Wylie* (1862), 10 H. L. C. 1; *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; *In Goods of Tucker* (1864), 3 Sw. & Tr. 585; 34 L. J. P. & M. 29; *In Goods of Coodr* (1867), L. R. 1 P. & D. 449; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530; 2 Cl. & F. 84. Compare *In Goods of Fittock* (1863), 32 L. J. P. & M. 157; *In Goods of Lord Howden* (1874), 43 L. J. P. & M. 26; *In Goods of De la Saussaye* (1873), L. R. 3 P. & D. 42; *In Goods of Harris* (1870), L. R. 2 P. & D. 83.

See the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, and Walker & Elgood (4th ed.), p. 35. The Land Transfer Act, while not affecting the ultimate beneficial succession to real property, vests such property, with certain exceptions mentioned in sect. 1, sub-sect. (4), on the death of the deceased owner in his personal representative, as if it were a chattel real vesting in him, and gives to the personal representative (executor or administrator) the administration of such real estate. The Land Transfer Act, 1897, does not apply to Ireland or Scotland, nor, indeed, to any land outside England.

<sup>2</sup> The grants made by the Court, whether grants of letters of administration or grants of probate, are of different kinds. Thus the Court may make a general grant of administration where the deceased dies without having made any will at all, or a grant of administration *cum testamento annexo*, as where a person dies having made a will and has not appointed an executor who can and will act. So, again, the Court may admit the whole of a will to probate, or may admit part only of a testamentary document to probate and refuse it as to the rest, or may grant limited probate where the testator has limited the executor. Walker & Elgood, chaps. v. to xi. These and other distinctions should be borne in mind. They do not, however, unless specially referred to, concern the Rules in this Digest. When a grant is mentioned therein, what is meant is, unless the contrary be stated, a general grant applying, as far as the English Courts can make it apply, to all the property of the deceased. As to the property which passes under an English grant, see chap. xi., Rule 75, p. 346, *post*.

<sup>3</sup> As to meaning of "property," see Rule 62, p. 303, *ante*.

<sup>4</sup> As contrasted with its being "constructively" or "fictitiously" situate in the country where the deceased dies domiciled, in accordance with the principle, *mobilia sequuntur personam*.

<sup>5</sup> But where a person who leaves no estate in England dies intestate residing and domiciled in a British colony, *e.g.*, Victoria, the Court may, for the convenience of the deceased's personal representatives who have obtained a colonial grant of administration, allow the grant to be resealed. *In Goods of Sanders*, [1900] P. 292.

The locality of the deceased's property under this Rule is not affected by his domicile at the time of his death.<sup>1</sup>

Comment.

The Court has jurisdiction to make a grant whenever the deceased dies leaving any property whatever situate in England, even if it be no more than his clothes. Hence, whenever a person dies in England, the Court has almost of necessity jurisdiction; the Court, again, has jurisdiction when property of the deceased comes into England after the date of his death; the foundation, in short, of the jurisdiction of the Court is that there is property of any kind of the deceased to be distributed within its jurisdiction,<sup>2</sup> *i.e.*, in England. Nor, as regards the Court's jurisdiction, does it appear to make any difference that goods of the deceased which, at the time of his death or after his death, have been in England, have been subsequently removed; in such a case there would be a right of action against any person who wrongfully removed them. The exercise, however, of the Court's jurisdiction, is to a certain extent a matter of discretion.<sup>3</sup>

Where, on the other hand, there is not or has not been in England any property (using that term in its very widest sense) of the deceased's, the Court has no jurisdiction<sup>4</sup> to make a grant.

"The foundation of the Court's jurisdiction being property of a deceased to be distributed in this country, administration will not be granted in respect merely of property abroad. It is a condition precedent to a grant that it should appear that the deceased left property in this country either real or personal."<sup>5</sup>

"A will disposing only of property in a foreign country is not entitled to probate; unless it confirms, and so incorporates, the English will."<sup>6</sup>

<sup>1</sup> *Attorney-General v. Hope* (1834), 1 C. M. & R. 530; 2 Cl. & F. 84; *Fernandes' Executors' Case* (1870), L. R. 5 Ch. 314; *In Goods of Ewing* (1881), 6 P. D. 19; *Ladlay v. Lord Advocate* (1890), 15 App. Cas. 468, 483.

<sup>2</sup> *In Goods of Tucker* (1864), 3 Sw. & Tr. 585, 586.

<sup>3</sup> *In Goods of Ewing* (1881), 6 P. D. 19.

<sup>4</sup> See, for what may possibly be considered an exception to the rule that the Court has no jurisdiction where there is no property in England, p. 311, note 2, *post*; and compare *Tristram & Coote*, pp. 37—40. Notice, generally, the statements as to the local situation of personal property, pp. 309—314, *post*.

<sup>5</sup> *Walker & Elgood* (4th ed.), p. 35; and see *Land Transfer Act*, 1897, s. 1, sub-s. 3.

<sup>6</sup> *Walker & Elgood*, p. 25; *In Goods of Lord Howden* (1874), 43 L. J. P. & M. 26; *In Goods of Lockhart* (1893), 69 L. T. 21.

“ It is not,” it has been laid down with reference to a particular case, “ one of the functions of this Court to determine, as an abstract question, who is the proper representative of a deceased person, and if the Courts of France insist upon such a declaration they are very unreasonable. The foundation of the jurisdiction of this Court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this case the deceased had no property within this country, and the Court has therefore no jurisdiction.”<sup>1</sup>

Two points deserve special attention :—

(1) *As to property of the deceased.*—The property, the situation of which in England gives the Court jurisdiction, must be property as defined in Rule 62.<sup>2</sup>

The property, further, must be situate in England, in the character of property of the deceased, or at any rate of property to which the administrator under an English grant has a claim. The Court will not derive jurisdiction from the mere fact that property in a foreign country, which did belong to the deceased at the time of his death, but has there since his death become lawfully the property of another, comes into England.<sup>3</sup>

(2) *As to the “ situation ” of property.*—In most instances the situation of property, *i.e.*, whether it is or is not situate in England, does not admit of doubt ; but it sometimes happens that there is a real difficulty in affixing to property, especially where it consists of debts or other *choses in action*,<sup>4</sup> its due local position. In the determination of the locality properly assignable to the different kinds of personalty which have been owned by a testator or intestate, the High Court is in the main guided by maxims (modified in some instances by statute) derived from the practice of those ecclesiastical tribunals whose jurisdiction in “ matters and causes testamentary,” to use a convenient expression taken from the Probate Act, 1857, has ultimately passed to the High Court.<sup>5</sup> These maxims, as modified by statutory enactments, are based on two considerations : the first is, that property, so far as it consists of tangible things, must in general be held situate at the place

<sup>1</sup> *In Goods of Tucker* (1864), 3 Sw. & Tr. 585, 586, judgment of Sir J. P. Wilde.

<sup>2</sup> See p. 303, *ante*.

<sup>3</sup> See chap. xi., Rule 75, *post* ; chap. xviii., Rule 120, *post* ; and chap. xxiv., Rule 143, *post*.

<sup>4</sup> See pp. 75, 76, *ante*.

<sup>5</sup> Under the Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 1, 3, 4, 23, taken together with the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

where at a given moment it actually lies ; the second is, that property may in some instances, and especially where it consists of debts or choses in action, be held to be situate at the place where it can be effectively dealt with. From these two considerations flows the following general maxim, viz., *that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides ; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.* Thus English lands, whether freehold or leasehold, are situate in England ; and so goods, lying in a warehouse in England, are to be held situate in England, and debts due from debtors resident in England are also to be held there situate ; French lands, on the other hand,—goods in French warehouses, and, in general, debts due from debtors resident in France,—are to be held situate in France.<sup>1</sup>

But the considerations on which our general maxim is grounded introduce some real or apparent exceptions to its operation.

Any British ship, for example, belonging to a deceased person, which is registered at any port of the United Kingdom, is to be held, for some purposes at any rate, to be situate at that port :<sup>2</sup> so goods on the high seas which are capable of being dealt with in England by means of bills of lading in this country are,

<sup>1</sup> As to the locality of a simple contract debt, see *Attorney-General v. Higgins* (1857), 2 H. & N. 339, 348 ; and *Attorney-General v. Bouvens* (1838), 4 M. & W. 171, 192, judgment of Abinger, C. B. ; *In re Maudslay, Sons & Field*, [1900] 1 Ch. 602. “The locality of a mortgage debt is regulated by the same rules that apply to other debts, and in no way depends on the situation of the property comprised therein.” Hanson (5th ed.), p. 271. This statement is quite consistent with *Sudeley v. Attorney-General*, [1897] A. C. 11, and *In re Smyth*, [1898] 1 Ch. 89, but must be taken subject to two reservations :—(1) A mortgage debt must be generally a specialty debt, and in cases not coming within the Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39, i.e., where the debt is due from a debtor in the United Kingdom, a specialty debt is situate where the mortgage deed happens to be at the date of the death of the creditor. Conf. p. 316, *post* ; and see, especially, Hanson (5th ed.), p. 270. (2) Where an English creditor dies possessed of debts secured by foreign mortgages, e.g., of land in France, then if under French law the debt so secured is treated as an immovable, it would (*semble*) be held by an English Court to be immovable property situate out of England. See *Lawson v. Commrs. of Inland Revenue*, [1896] 2 I. R. 418, 435, judgment of Palles, C. B. ; and compare *In re Fitzgerald*, [1904] 1 Ch. (C. A.), 573, 583, 584, 588.

<sup>2</sup> See 27 & 28 Vict. c. 56, ss. 4, 5.



wherever actually situate, to be held situate in England;<sup>1</sup> and goods which at the death of the deceased owner are *in transitu* to this country, and arrive here after his death, are apparently to be held situate in England at his death.<sup>2</sup>

When bonds, again, or other securities, *e.g.*, bills of exchange, forming part of the property of a deceased person, are in fact in England and are marketable securities in England, saleable and transferable there by delivery only, without its being necessary to do any act out of England in order to render the transfer valid, not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England.<sup>3</sup> The reason manifestly is that the bonds or bills, though they may from one point of view be looked upon as mere evidence of debts which, being due from persons resident abroad, should be considered situate in a foreign country, are in reality chattels of which the representative of the deceased owner can obtain the full value in England, and this without doing any act in a foreign country. Such bonds differ essentially from any foreign stock which cannot be fully transferred by the representative of the deceased without doing some act in a foreign country. The certificates or other documents, if any, held by the owner of such stock, may be in England, but they are mere evidence of a debt due from a foreign government, or, in other words, from a debtor not resident in England, and this debt, *i.e.*, the stock, must apparently be held situate out of England.<sup>4</sup>

Owing to the view held by the ecclesiastical tribunals that a

<sup>1</sup> *Attorney-General v. Hope* (1834), 1 C. M. & R. 530.

<sup>2</sup> *Attorney-General v. Pratt* (1874), L. R. 9 Ex. 140; *Wyckoff's Case* (1862), 3 Sw. & Tr. 20; 32 L. J. P. & M. 214.

Under this head may be brought the exceptional cases in which the Court, though there is no property of the deceased strictly situate in England, will make a grant on the ground that he has left property in a foreign country, *e.g.*, money at a bank in Canada, which would be remitted to England by the banker, on a personal representative being constituted in England. The money is in this case virtually *in transitu*.

See Story, ss. 519, 520, for a suggestion that ships and cargoes which, though in fact in England, are on the point of returning to the country, *e.g.*, New York, where their owner dies domiciled, should be treated as situate in New York at the time of the owner's death.

<sup>3</sup> *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; *Winans v. The King*, [1908] 1 K. B. (C. A.) 1022.

<sup>4</sup> Compare *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, 192, 193, with *Attorney-General v. Dimond* (1831), 1 C. & J. 356; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530. But see *Stern v. Reg.* (1896), 12 Times L. R. 134.

debt due on a deed or other specialty was to be considered as situate, not where the debtor resided, but at the place where the deed itself was situate,<sup>1</sup> and the modification of this doctrine by a statutory enactment,<sup>2</sup> the rules as to the situation of such a debt are anomalous. A debt due on a deed situate in England from a debtor resident abroad,<sup>3</sup> and also a debt due on a deed situate abroad from a debtor resident in England,<sup>4</sup> must each be held situate in England. A debt due on a deed situate abroad from a debtor resident abroad is, like any other debt due from such debtor, to be held situate out of England.<sup>5</sup>

It was, further, long ago "established by law that judgment "debts were assets, for the purposes of jurisdiction, where the judgment is recorded;"<sup>6</sup> and this rule, though it sounds technical, is in substantial conformity with the principle regulating the locality of debts, for a judgment debt is enforceable by execution, or some similar process, in the country where the judgment is recorded.<sup>7</sup>

A share, lastly, in a partnership business is to be held situate, not where the surviving partners reside, but where the business is carried on. "The share of a deceased partner in a partnership "asset," it has been laid down by Sir James Hannen, "is situate "where the business is carried on,"<sup>8</sup> and this view has been followed by the House of Lords.<sup>9</sup>

Most of the reported decisions and of the enactments with regard to the local situation of a deceased person's personalty have immediate reference, not to jurisdiction, but to the liability

<sup>1</sup> See *Commissioner of Stamps v. Hope*, [1891] A. C. 476; *Gurney v. Rawlins* (1836), 2 M. & W. 87.

<sup>2</sup> See Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39.

<sup>3</sup> *Commissioner of Stamps v. Hope*, [1891] A. C. 476.

<sup>4</sup> Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39.

<sup>5</sup> See pp. 309, 310, *ante*.

<sup>6</sup> *Attorney-General v. Bouvens* (1838), 4 M. & W. 171, 191, judgment of Abinger, C. B.

<sup>7</sup> A debt due on a foreign, e.g., a French, judgment, is not indeed in strictness a judgment debt (*Duplein v. De Roven* (1705), 2 Vern. 540), but it is nevertheless recoverable in the country where the judgment is obtained.

<sup>8</sup> *In Goods of Ewing* (1881), 6 P. D. 19, 23. Compare, however, *Attorney-General v. Sudeley*, [1895] 2 Q. B. 526, 530, judgment of Russell, L. C. J.

<sup>9</sup> *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468; see *Beaver v. Master in Equity of Victoria*, [1895] A. C. 251; *Commissioner of Stamp Duties v. Salting*, [1907] A. C. 449. A share in an English company is (*semble*) locally situate in England, and liable to estate duty. *Attorney-General v. New York Breweries Co.*, [1899] A. C. 62.

of the deceased's property to the payment of probate duty.<sup>1</sup> The two matters, however, are closely connected. The jurisdiction of the High Court in matters testamentary depends on there being property of the deceased situate within the limits of a district in England over which an ecclesiastical Court used to exercise jurisdiction, and probate duty, whilst it existed,<sup>2</sup> was imposed only on such personal property of the deceased as at the time of his death was situate within such limits.<sup>3</sup> Hence where, under any decision or statute, it can be shown that any property of a deceased person would, if probate duty now existed, be liable to such duty, it follows that such property is so situate in England as to give the Court jurisdiction to make a grant. The inference, however, must not be drawn that, because no personal property of the deceased would be liable to the payment of probate duty if such duty still existed, therefore there is nothing belonging to the deceased so situate in England as to give the Court jurisdiction to make a grant; and this for two reasons. The first is, that probate duty was chargeable only on property situate in England at the time of the deceased's death. The second is, that the character of the thing or the property, on the situation whereof liability to probate duty depended, is not always exactly the same as the character of the thing or property on the situation whereof the jurisdiction of

<sup>1</sup> See *Attorney-General v. Bouvens* (1838), 4 M. & W. 171, 191, 192, judgment of Abinger, C. B.; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530, especially pp. 560, 561, language of Lord Brougham, and compare 22 & 23 Vict. c. 36; 25 & 26 Vict. c. 22; 27 & 28 Vict. c. 56. See, as to relation between liability to probate duty and liability to estate duty, App., Note 8, "Limits of Taxation." The technical and somewhat artificial distinctions as to the situation of personal property in reference to the incidence of probate duty may still occasionally be of importance in reference to the incidence of estate duty. See Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 2, and s. 8, sub-s. 1.

<sup>2</sup> It is for all practical purposes abolished as regards property passing on the death of a person dying after 1st August, 1894. See the Finance Act, 1894, s. 1, and First Schedule.

<sup>3</sup> *I.e.*, in so far as the duty fell on *English* property. Probate duty fell on property situate in other parts of the United Kingdom (see Hanson (3rd ed.), pp. 1—3), but all reference to it as a tax on movable or personal property in Scotland or Ireland is here purposely omitted. The English cases refer to duty payable in respect of property alleged to be situate in England, and therefore in these cases the decision that property is or is not liable to probate duty is a decision that it is or is not situate in England. The principles, however, for determining its locality were the same whatever was the part of the United Kingdom in which it was alleged to be situate. Hence a Scotch decision, such as *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468, gives us guidance in deciding whether given property is or is not situate in England.

the ecclesiastical Courts depended, and the jurisdiction of the High Court still depends. The liability to duty used to depend on the situation in England of a thing of some pecuniary value on which the tax could operate, *e.g.*, a debt owing to the deceased. The jurisdiction of the Court depends on there being in England some thing—if the word “thing” be used in a very wide sense—for the dealing with which the representative of the deceased requires a grant. These two things may, but they may not, coincide. Thus the deceased dies in France and leaves debts due to him from Frenchmen living in France. The only things he has left in England are letters, of a merely nominal value in themselves, but needed by his representatives as evidence of the French debts; the holder of the letters will not give them up to any one who has not constituted himself in England the representative of the deceased. Under these circumstances there is no property of the deceased in England which would have been liable to probate duty, but there is property of the deceased, *viz.*, the letters, to which the representative of the deceased has a right, and the presence of which in England gives the Court jurisdiction to make a grant.

*Domicil.*—The fiction embodied in the often misleading maxim, *mobilia sequuntur personam*, under which the movables of a deceased person are for some purposes<sup>1</sup> regarded as situate in the country where he has his domicile at the time of his death, has no application to the local situation of personal property as regards the jurisdiction of the Court to make a grant.<sup>2</sup>

<sup>1</sup> *E.g.*, the distribution of, and the beneficial succession to, an intestate's movables (see chap. xxxi., *post*), or the determination of the liability of a deceased person's movables to legacy duty. (See App., Note 8, “Limits of Taxation.”)

<sup>2</sup> See p. 307, *ante*. For a contrary view, see Browne, Prob. Prac. (2nd ed.), p. 143, where it appears to be stated that the Court has jurisdiction to grant probate whenever a person dies domiciled in England. This opinion derives some apparent countenance from *Spratt v. Harris* (1833), 4 Hagg. Ecc. 405; *In re Winter* (1861), 30 L. J. P. & M. 56, but is inconsistent with *Attorney-General v. Hope* (1834), 1 C. M. & R. 530; 2 Cl. & F. 84; *In Goods of Fittock* (1863), 32 L. J. P. & M. 157; *In Goods of Cooke* (1867), L. R. 1 P. & D. 449, and generally with the well-established principle that “probate duty attaches to *bona notabilia* in the “place where the goods are situate, wholly irrespective of the question of the “domicil of the testator.” *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468, 483, language of Herschell, L. C. See *In Goods of Ewing* (1881), 6 P. D. 19, 23, judgment of Sir J. Hannen; *Fernandes' Executors' Case* (1870), L. R. 5 Ch. 314, 317, judgment of Giffard, L. J.

## Illustrations.

1. *T*,<sup>1</sup> a Frenchman, dies domiciled in France. He is owner of freeholds in England. The Court has jurisdiction.<sup>2</sup>

2. *T*, a Frenchman domiciled in France, dies in France leaving goods in England and book debts due to him from *X*, a Frenchman residing in England.<sup>3</sup> The Court has jurisdiction.

3. *T* dies in Australia leaving money due to him from an incorporated banking company having its head office in London.<sup>4</sup> The Court has jurisdiction.

4. *T* dies in France. *X*, who resides in England, owes *T* 100*l.* on a bond which is in France. The Court has jurisdiction.<sup>5</sup>

5. *T* dies in France. *X*, who resides in France, owes *T* a debt under a deed which is situate in England. The Court (*semble*) has jurisdiction.<sup>6</sup>

6. *T* dies in Paris. Before his death he has purchased at New Orleans a cargo of cotton. At the time of his death it is on the high seas on board an American ship, and bills of lading under which the cotton can be disposed of are in London in the hands of *T*'s broker. The Court has jurisdiction.<sup>7</sup>

<sup>1</sup> "*T*" in the illustrations to this Rule stands for testator, but for the purpose of the Rule it makes no difference whether the deceased died testate or intestate. In each of these illustrations it is to be assumed that there was no other property of the deceased in England than that mentioned in the illustration.

<sup>2</sup> See the Land Transfer Act, 1897, s. 1.

<sup>3</sup> *Preston v. Lord Melville* (1840), 8 Cl. & F. 1; *Enohin v. Wyllie* (1862), 10 H. L. C. 1; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34.

<sup>4</sup> The company resides legally where it has its head office. (See Rule 19, pp. 160, 161, *ante*.) Hence there is a debt due to the deceased from a debtor resident in England. "Property which consists of shares in or claims upon any company or society, is 'locally situate where the company has its head office.'" Hanson (5th ed.), p. 272. Compare *Attorney-General v. Higgins* (1857), 2 H. & N. 339; and *Fernandes' Executors' Case* (1870), L. R. 5 Ch. 314.

<sup>5</sup> This is the apparent result of the Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39. This enactment (*semble*) takes specialty debts due from persons in the United Kingdom out of the operation of the exceptional rule that a specialty debt is situate where the deed is situate.

<sup>6</sup> *Commissioner of Stamps v. Hope*, [1891] A. C. 476, 481, judgment of P. C., delivered by Lord Field, where the rule as to the situation of specialty debts is explained.

<sup>7</sup> And this for two reasons. The cotton itself is to be considered as situate in England because it can be dealt with there. (See Hanson (5th ed.), p. 272, and compare *Attorney-General v. Hope* (1834), 1 C. M. & R. 530; *Attorney-General v. Pratt* (1874), L. R. 9 Ex. 140; *Wychoff's Case* (1862), 3 Sw. & Tr. 20.) The bills of lading are actually in England, and this would give the Court jurisdiction. Compare as to bills of exchange, &c., *Attorney-General v. Bouwens* (1838), 4 M. & W. 171.

7. *T*, a British subject, dies in France. He is owner of a British ship registered at the port of Liverpool. She is, at the time of *T*'s death, at New York. The Court (*semble*) has jurisdiction.<sup>1</sup>

8. *T* dies domiciled in France. Two months after his death, goods purchased by him in the United States, and ordered by him to be sent to London, arrive at the house in London where he had ordered them to be sent. His personal representative, under French law, applies for a grant. The Court has jurisdiction.<sup>2</sup>

9. *T* is a member of a partnership carrying on business in England, and is entitled to a share in the partnership assets; he dies abroad domiciled in France. The Court has jurisdiction.<sup>3</sup>

10. *T*, an Englishman resident in France, dies there, having by his will appointed *A* his executor. *T* leaves at the moment of his death jewels worth 1,000*l.* in England. *T*'s son, an Englishman, who also resides in France, is at the moment of *T*'s death in England. He takes possession of the jewels and returns with them to his home in France. After the removal of the jewels *A* applies for a grant of probate. The Court has jurisdiction.<sup>4</sup>

11. The wife of an Englishman residing and domiciled in England is separated from him and living in France. She dies there intestate, leaving movables in France, but leaving no property in England. The husband cannot establish his claim in France to her property without an English grant. The Court has (*semble*) no jurisdiction to make a grant.<sup>5</sup>

12. *T* dies abroad domiciled in England. By his will he has appointed *A* his executor. He leaves money in a bank at Chili and goods in warehouses in France. *A* applies for a grant of probate. The Court has no jurisdiction.<sup>6</sup>

13. *T* dies domiciled in England, but resident in New Zealand. He is at his death possessed of large sums of money invested on mortgages of real estate in New Zealand. The mortgagors are resident, and the mortgage deeds are in New Zealand. *T* bequeaths

<sup>1</sup> See Revenue Act, No. 2, 1864 (27 & 28 Vict. c. 56), s. 4.

<sup>2</sup> See pp. 307, 308, *ante*.

<sup>3</sup> Compare *In Goods of Ewing* (1881), 6 P. D. 19, 23, judgment of Sir Jas. Hannen; and *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468.

<sup>4</sup> See pp. 307, 308, *ante*.

<sup>5</sup> See *In Goods of Tucker* (1864), 3 Sw. & Tr. 585; and compare passage from judgment of Sir J. P. Wilde, cited p. 309, *ante*. Note that the wife is at the time of her death domiciled in England. See p. 132, *ante*; and conf. *Dolphin v. Robins* (1859), 7 H. L. C. 390.

<sup>6</sup> See *In Goods of Coode* (1867), L. R. 1 P. & D. 449.

the whole of his property to his wife who is resident in England. The Court (*semble*) has no jurisdiction.<sup>1</sup>

### (B) SUCCESSION.

RULE 64.<sup>2</sup>—Where the Court has no jurisdiction to make a grant,<sup>3</sup> the Court has no jurisdiction with regard to the succession to the property of a deceased person.

#### Comment.

English Courts will not discuss, and have no jurisdiction to adjudicate upon, the claim of any man to succeed beneficially to, or indeed to derive any benefit from, the property of a deceased person, unless there is before the Court some person authorized under an English grant<sup>4</sup> to deal with such property, and in respect thereof to represent the deceased. Even the representative under the law of a foreign country of a foreigner who dies domiciled abroad has no *locus standi*<sup>5</sup> before an English Court until he has obtained an English grant.<sup>6</sup>

The validity, indeed, of a will—a matter which affects succession—can be decided, and indeed can be decided only, in an action of which the object is to determine a person's claim to an English grant, *i.e.*, in a probate action. But this fact in no way invalidates Rule 64. A probate action involves or implies the authority of the Court to make a grant.

<sup>1</sup> Compare *Sudeley v. Attorney-General*, [1897] A. C. 11. "It will be observed " that in this case the freedom from duty of the husband's estate in respect of the " New Zealand mortgages was admitted by the Crown; but, although it is not so " stated in the report of the case, the reason, no doubt, was that the mortgage deeds " were in New Zealand at the date of the death of the husband, and the locality of " the specialty debt would therefore be New Zealand, for a specialty debt is situate " where the specialty is found at the time of the creditor's death (*Commissioner of " Stamps v. Hope*, [1891] A. C. 476)." Hanson (5th ed.), p. 270.

<sup>2</sup> See *Attorney-General v. Hope* (1834), 1 C. M. & R. 530, and especially p. 540, language of Brougham, L. C., and pp. 562—564 (note).

<sup>3</sup> See, for meaning of "grant," p. 303, *ante*; and see also, as to where Court has no jurisdiction to make a grant, Rule 63, p. 307, *ante*.

<sup>4</sup> See p. 303, *ante*.

<sup>5</sup> Compare 2 Williams (10th ed.), p. 1648; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530, 540, 562—564.

<sup>6</sup> As to extension of a Scotch grant, of an Irish grant, or of a Colonial grant to England, see chap. xviii., Rules 122—124, pp. 453—455, *post*.

## Illustrations.

1. The deceased, domiciled in England, has died in France intestate, leaving goods and money in France, but leaving no property of any kind in England. *A* claims the intestate's property as his next of kin. The Court has no jurisdiction to determine whether *A* is entitled to succeed to the property.<sup>1</sup>

2. *T* dies domiciled in England. By his will, made in accordance with the English Wills Act, he appoints *X* his executor. *T* leaves no property whatever in England. He leaves goods and money in France and in Germany. *A* claims a legacy of 10,000*l.* under *T*'s will. The Court has no jurisdiction to determine whether *A* is entitled to the legacy.<sup>2</sup>

RULE 65.—Where the Court has jurisdiction<sup>3</sup> to make a grant, the Court has, in general, jurisdiction to determine any question with regard to the succession to the assets of a deceased person.

## Comment.

The jurisdiction of the Court is in no way restricted to dealing with the property the presence of which in England gives it authority to make a grant. Where jurisdiction to make a grant exists, the Court has (in general) jurisdiction<sup>4</sup> to determine every question whatever connected with succession to movables, and to provide for the succession to the assets of the deceased, or rather to the distributable residue thereof. With regard to such distributable residue the Court, for example, has authority to decide

<sup>1</sup> Compare *In Goods of Tucker* (1864), 34 L. J. P. & M. 29; 3 Sw. & Tr. 585.

<sup>2</sup> Compare *In Goods of Coode* (1867), L. R. 1 P. & D. 449.

<sup>3</sup> As to where the Court has jurisdiction to make a grant, see Rule 63, p. 307, *ante*. But this must be taken subject to Rule 39, clause 1 (p. 201, *ante*), that the Court has no jurisdiction to determine the title to, or the right to the possession of, foreign land.

<sup>4</sup> Whether the jurisdiction is exercised in a probate action brought in the Probate Division of the High Court, or in an administration action brought in the Chancery Division of the High Court, is for the purpose of these Rules immaterial. It is in either case equally the jurisdiction of the High Court. Note, further, the extremely wide jurisdiction of the Court, when it has before it representatives of the deceased, to administer in an administration action the whole property of the deceased as far as lies within the power of the Court. See *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; (1885) 10 App. Cas. 453.



whether the will or alleged will of the deceased is a valid testamentary disposition,<sup>1</sup> what is the construction or effect of the will,<sup>2</sup> who are the persons entitled to succeed to the movable property of an intestate,<sup>3</sup> and the like, and generally to provide for the due succession to the assets of the deceased.

The words "in general" in our Rule point out that the jurisdiction of the Court under that Rule is not absolutely unrestricted. The Court's jurisdiction is exercised, generally speaking, on an administration action<sup>4</sup> being brought by some one, *e.g.*, a legatee, or next of kin, interested in the distribution of a deceased testator or intestate's estate, for the purpose of having the estate administered by the Court. For the maintenance of such an action, it is necessary that the personal representative, who has obtained an English grant, should be made a party to it, for "an estate cannot be administered . . . in the absence of a personal representative. And, consequently, if it appear that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the Court;"<sup>5</sup> and "in cases where the executor or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government; but he must obtain his right to represent the estate from the Probate Court in this country."<sup>6</sup>

But this action, like every other, commences with the issue of a writ, which must be served upon the personal representative, or, using the word "administrator" in a wide sense, upon the administrator. And any restriction on the service of the writ is, as we have already pointed out,<sup>7</sup> a restriction on the exercise of the Court's jurisdiction. When the administrator is in England, the Court has jurisdiction to entertain the action, for it is always possible for the administrator to be served with the writ. When the administrator is not in England, the rule still is that he cannot

<sup>1</sup> *Bremer v. Freeman* (1857), 10 Moore, P. C. 306.

<sup>2</sup> *Enoh v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402.

<sup>3</sup> *Doghani v. Crispin* (1866), L. R. 1 H. L. 301.

<sup>4</sup> See as to an administration action, Williams, *Executors* (10th ed.), p. 1608, and following; and see as to proceedings on an originating summons, R. S. C. Ord. LV. rr. 3—14, and note that an originating summons cannot be served out of England. 2 Williams, *Executors* (10th ed.), p. 1543, note (a); *In re Busfield* (1886), 32 Ch. D. (C. A.) 123.

<sup>5</sup> 2 Williams, *Executors*, pp. 1646, 1647.

<sup>6</sup> *Ibid.* p. 1648.

<sup>7</sup> See pp. 222, 223, *ante*.

be served with the writ, and therefore that the Court has no jurisdiction to entertain an action against him.<sup>1</sup> To this rule the exceptions are, it is true, extremely wide. Whenever an "action" is for the administration of the personal estate of any deceased "person, who at the time of his death was domiciled" in England,<sup>2</sup> the Court has jurisdiction to allow service of a writ, and therefore to entertain an action against the administrator though he is out of England; so, again, the Court has jurisdiction to entertain an administration action against an administrator who is out of England in any of the exceptional cases, in so far as they can possibly be applicable to such an action, in which the Court has jurisdiction to entertain an action *in personam* against a defendant who is out of England.<sup>3</sup> But, wide as are the exceptions to the principle that the Court has no jurisdiction to entertain an administration action against an administrator who is not in England, they do not apparently cover every case which can arise.<sup>4</sup>

#### Illustrations.

1. *T*, a Frenchman domiciled in England, dies there, leaving a house, of which he is tenant for years, household furniture, and other goods in England. *T* leaves a will, the construction of which is doubtful. The Court has jurisdiction to determine whether the will is valid, and who are the persons entitled beneficially to *T*'s property under the will.<sup>5</sup>

2. *N*, a Frenchman domiciled in England, dies in France intestate, leaving in England leasehold property, household furniture, and stock in trade. The Court has jurisdiction to determine who are the persons beneficially entitled to *N*'s property.<sup>6</sup>

3. *T* dies domiciled in Russia, leaving money in the English funds. Under a will made in the form required by Russian law,

<sup>1</sup> See *In re Eager* (1882), 22 Ch. D. (C. A.) 86, which is not inconsistent with *In re Lane* (1886), 55 L. T. 149, where (*semble*) service was allowed under R. S. C. Ord. XI. r. 1 (g).

<sup>2</sup> R. S. C. Ord. XI. r. 1 (d). The words in the rule of Court are not "in England," but "within the jurisdiction." Compare p. 193 and p. 225, note 4, *ante*.

<sup>3</sup> See Exceptions 1 to 7 (pp. 225—243, *ante*) to Rule 46, p. 222, *ante*.

<sup>4</sup> See *Wood v. Middleton*, [1897] 1 Ch. 151.

<sup>5</sup> Compare *Enchin v. Wylie* (1862), 10 H. L. C. 1.

<sup>6</sup> *Re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 263; *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441.

*T* appoints *X* his executor. *X* is recognised as *T*'s executor by the Russian Courts, and consequently the will can be proved here by him. A question arises under *T*'s will whether *T* did or did not die intestate as to his English property. The Court has jurisdiction to determine the construction of *T*'s will, and to divide *T*'s property in England among the persons who, on a right construction of the will, are beneficially entitled to it; but as a general rule the Court, having granted probate to *X*, will leave the persons claiming succession to *T*'s personal property to enforce their rights before the Russian tribunals.<sup>1</sup>

4. *N*, domiciled in New York, dies there intestate, leaving goods and lands in New York, and money and stock in trade in England. *A* obtains letters of administration in New York. *B*, in England, claims to be entitled to the whole of *N*'s movable property as next of kin. *A*, as the representative of *N* under the law of *N*'s domicile, claims to have *N*'s movable estate in England handed over to him. The Court has jurisdiction to determine what are the rights of *B*, but will, in general, grant administration to *A*, and leave *B* to enforce his rights (if any) before the Courts of New York.<sup>2</sup>

<sup>1</sup> Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402, 409. Compare, however, *Eames v. Hacon* (1880), 16 Ch. D. 407, 409; (1881) 18 Ch. D. (C. A.) 347.

<sup>2</sup> See *Enohin v. Wylie* (1862), 10 H. L. C. 1. That case refers to the construction of a will; but there is, in principle no distinction as regards the jurisdiction of the Court between the rules applicable to testamentary and those applicable to intestate succession.

## CHAPTER X.

STAYING ACTION—*LIS ALIBI PENDENS*.

RULE 66.—The Court has jurisdiction to interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceeding.<sup>1</sup>

But this jurisdiction will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious and oppressive.<sup>2</sup>

## Comment.

The Court has a very wide jurisdiction to prevent the abuse of its process, and, by staying an action or otherwise, to hinder vexation or oppression. What is vexatious or oppressive, and whether the administration of justice is being perverted for an unjust end or not, is a matter in each case for the decision of the Court, in accordance with the circumstances of the particular case.

"I agree," says Bowen, L. J., "that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case. . . . The kind of jurisdiction which the Court exercises over litigation is, as I have said, to prevent

<sup>1</sup> *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 408, judgment of Bowen, L. J.; *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch. D. (C. A.) 225, 232, judgment of Lindley, L. J.; and p. 233, judgment of Bowen, L. J.

<sup>2</sup> *The Christiansborg* (1885), 10 P. D. (C. A.) 141, 155.

“ what is vexatious and an abuse of its own process. There are many classes of cases in which the Court acts on that principle, which I will not attempt now to enumerate.”<sup>1</sup>

These cases may, of course, have nothing to do with the conflict of laws, or with the fact that a cause of action or ground of defence arises in a foreign country. Still, the cases in which a party to an action applies to have it stayed or dismissed are very often, in some way or other, connected with transactions taking place in a foreign country. The exercise of jurisdiction to stay or dismiss an action is obviously discretionary, and will be exercised only when it clearly prevents the exercise under legal forms of vexation or oppression.

### Illustrations.

1. *A*, a Scotchman, is domiciled in Scotland. He brings an action in respect of a cause of action arising wholly in Scotland against *W & Co.*, a company whereof the head office is in Scotland, though it has a branch office in England, *X*, who is resident in Scotland, *Y*, a director resident in Scotland, who does not appear, *Z*, a director resident in London, but also an uncertified bankrupt. The decision of the case depends wholly upon Scotch law, and mainly upon the evidence of persons resident in Scotland. The Court has jurisdiction to stay, and stays the action.<sup>2</sup>

2. *A* is the wife of an American domiciled in India. In 1902 a deed of separation is executed between *A* and her husband, under which he covenants to pay *A* a certain allowance. *X*, a solicitor, practising in Madras, is a trustee under the separation deed. *A*'s husband makes default in payment of the allowance, and *X*, as alleged by *A*, wilfully and negligently neglects to take proceedings against *X*, whereby *A* is unable to recover the money due by way of allowance from her husband. While *A* and *X* are each temporarily resident in England, *A* brings an action against *X* for negligence, and *X* is, whilst in England, served with a writ. Since the issue of the writ *A* has left England for America, and *X* has returned to India. The Court, on an application on *X*'s behalf, dismisses action.<sup>3</sup>

<sup>1</sup> *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 407, 408, judgment of Bowen, L. J.; compare *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch. D. (C. A.) 225.

<sup>2</sup> *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141.

<sup>3</sup> *Egbert v. Short*, [1907] 2 Ch. 205. The *ratio decidendi* seems to be the unfairness and inconvenience to *X* of his being in fact compelled to defend the action,

3. *W*, the wife of *H*, an officer in the Indian army, stationed in Bombay, goes to England. Within two months *H* takes proceedings in the Bombay Court against *W* for divorce. Two days after the petition is served upon her in England, *W* begins a suit against *H*, who is then in England on short leave, for restitution of conjugal rights. *H* applies to the Court to stay proceedings in *W*'s suit till the determination of the proceedings by *H* in Bombay. The Court refuses to stay *W*'s proceedings.<sup>1</sup>

4. *A* and *B* reside in Honduras. *X* and *Y* are partners, and carried on business under the name of *G & Co.* in London. They are resident in England. *A*, *B* and *X* had carried on business as partners in Honduras. The London firm are agents of the Honduras firm. On the dissolution of the Honduras partnership *X* obtains a decree in Honduras for taking partnership accounts. Before the accounts are taken *A* and *B* bring an action in England against *X* and *Y* for an account of the dealings between the two firms, alleging that *X* and *Y* have made improper profits of agency. *X* and *Y* deny having made improper profits, and counterclaim to have the accounts of the Honduras firm, *A*, *B* and *X*, taken. Application to have counterclaim struck out. Application refused.<sup>2</sup>

SUB-RULE.—The Court has jurisdiction to stay an action as vexatious or oppressive if proceedings are taken in respect of the same subject and against the

the decision of which would depend to a great extent on the Indian rules of procedure in England, and to return to England for that purpose. As *A* knew of her alleged grievance before she left India, it looks as if *A* were using her right of suing *X* in England as a means of extortion. The case nevertheless goes a very long way towards limiting the right to sue in England, for a foreign cause of action, any person whatever who is served with a writ in England.

<sup>1</sup> *Thornton v. Thornton* (1886), 11 P. D. (C. A.) 176. The *ratio decidendi* is (*semble*) that *W* has *prima facie* a right to prosecute the suit, and that it was not made clear that her doing so would work oppression, or waste, or vexation. Under the circumstances of *Thornton v. Thornton* (which followed, apparently, *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1), the question there raised could now hardly occur. The High Court would not admit the possibility of any other Court than the Court of the husband's domicile possessing divorce jurisdiction (see p. 384, *post*), or that a person serving in the British army could have an Indian domicile. Compare, however, the Indian Divorce Act, No. IV. of 1869, s. 2; and Rattigan, *Law of Divorce applicable to Christians in India*, pp. 2, 7, 13; and see Appendix, Note 14, "Divorces under the Indian Divorce Act, &c."

<sup>2</sup> See *Mutrie v. Binney* (1887), 35 Ch. D. (C. A.) 614, 635.

same defendant both in the Court and in a Court of a foreign country.<sup>1</sup>

- (1.) If such foreign Court is a Court of the United Kingdom or (*semble*) of any country forming part of the British dominions, the plaintiff's proceedings are *primâ facie* vexatious.<sup>2</sup>
- (2.) If such foreign Court is a Court of any country not forming part of the British dominions, the plaintiff's proceedings are *primâ facie* not vexatious.<sup>3</sup>

#### Comment.

"I think," said Bowen, L. J., "that *Cox v. Mitchell*<sup>4</sup> . . . simply lays down the proposition that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same. So understood, it seems to me to be common sense. . . . This particular application is based on the suggestion that the Court ought to interfere to prevent what is called multiplicity of suits—litigation in various quarters of the world on the same subject-matter between the same parties and at the same time. [1.] Where there is more than one suit being carried on in the Queen's Courts [in England], it is obvious that the case is wholly different. The remedy and the procedure are the same, and a double action on the part of the plaintiff would lead to manifest injustice. [2.] When you get to the case of concurrent litigation both in the Queen's Courts in England and in the Queen's Courts in Ireland and Scotland, the law has probably varied a little. At a time when it was difficult to enforce the judgments of an English Court in other parts of the United Kingdom, it was not unreasonable that the case of *Lord Dillon v. Alvares*<sup>5</sup> should have been decided as it was. At present I think that case can no longer be cited as conclusive law. I have spoken of the Queen's Courts in Ireland and Scotland. [3.] With regard

<sup>1</sup> *I.e.*, of any country which is not England. See pp. 68, 71, *ante*.

<sup>2</sup> *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 408, judgment of Bowen, L. J.

<sup>3</sup> *Ibid.*, and *Cox v. Mitchell* (1859), 7 C. B. N. S. 55.

<sup>4</sup> (1859), 7 C. B. N. S. 55.

<sup>5</sup> (1798), 4 Ves. 357.

" to the Queen's Courts abroad, the Consular Courts abroad, the same sort of principle no doubt applies. They are Courts of co-ordinate jurisdiction, sufficiently in the nature of English Courts to render it probable that it may be true, as Sir Robert Phillimore says, that an English Court would not favour the institution and the prosecution of litigation both in the Consular Courts and at home. [4.] But when you come to the Courts of the United States of America [or of any country not forming part of the British dominions], it seems to me the case is wholly different, and for the reasons which have been pointed out at length by the Master of the Rolls and Lord Justice Cotton. The fact that no English action has ever yet been stayed on the ground of concurrent litigation in America is a strong argument to prove that such concurrent American litigation is not by itself a sufficient reason why an English action should be stayed. That the Court has power to do it I agree. It is clear, not merely from reason, but from the language of Lord Cottenham<sup>1</sup> and Lord Cranworth,<sup>2</sup> referred to by Lord Justice Cotton, that this Court could do it if necessary for the purposes of justice, but some special circumstances ought surely to be brought to the attention of the Court beyond the mere fact that an action is pending between the parties on the same subject-matter in America."<sup>3</sup>

### Illustrations.

1. *A*, who has commenced an action against *X* in a Scotch Court, also commences an action against him for the same cause of action in the High Court. *A*'s proceedings are *prima facie* vexatious.<sup>4</sup>

2. *A* brings an action against *X* in Victoria, and also for the same cause of action brings an action against *X* in the High Court. *A*'s proceedings are (*semble*) *prima facie* vexatious.<sup>4</sup>

<sup>1</sup> *Wedderburn v. Wedderburn* (1837), 4 My. & Cr. 596.

<sup>2</sup> *Carron Iron Co. v. McLaren* (1855), 5 H. L. C. 416, 437.

<sup>3</sup> *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 408, 409, judgment of Bowen, L. J. Compare judgment of Cotton, L. J., *ibid.*, pp. 405, 406.

It may happen that *A*, who is plaintiff in an action in a foreign country against *X* in respect of a particular claim, makes the same claim here in England in the shape of a counterclaim in an action brought by *X* against *A*. Such a counterclaim will not *prima facie* be treated as vexatious, but under peculiar circumstances the plaintiff may be treated as one who has, in effect, brought concurrent actions in respect of the same cause of action both in England and in a foreign country. *Mutrie v. Binney* (1887), 35 Ch. D. (C. A.) 614.

<sup>4</sup> See Sub-Rule, cl. 1; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141.



3. *A* brings an action against *X* in the Court for breach of contract committed at New York. He has already commenced an action in a New York Court against *X* for the same breach of contract. *A*'s proceedings are not *primâ facie* vexatious.<sup>1</sup>

4. *A & Co.*, an English company, brings an action against *X* and *Y*, a firm of French merchants, for non-delivery of the cargo of certain ships, and in the alternative for damages and for an injunction. When the action began the ships were in British waters. They have since been removed to ports in France and taken possession of by *X* and *Y*. Proceedings have been commenced by *A & Co.* in a French Court for the recovery of the cargoes. The claim in the English action comprises the cargo of a ship which is not claimed in the French action. The proceedings of *A & Co.* are not vexatious.<sup>2</sup>

<sup>1</sup> See Sub-Rule, cl. 1; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141.

<sup>2</sup> *Peruvian Guano Co. v. Bockuoldt* (1883), 23 Ch. D. (C. A.) 225, 232, 233.

## CHAPTER XI.

EXTRA-TERRITORIAL EFFECT OF  
ENGLISH JUDGMENT;  
ENGLISH BANKRUPTCY;  
ENGLISH GRANT OF ADMINISTRATION.

## (A) ENGLISH JUDGMENT.

RULE 67 —A judgment of the Court (called in this Digest an English judgment) has, subject to the exception hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law.

## Comment.

The judgment, or in other words the command of a Court, cannot of itself operate beyond the limits of the territory over which the Court has jurisdiction. An English judgment, therefore, has, *proprio vigore*, no operation in any country but England. The Courts of a foreign country may, and no doubt in many cases will, give effect to an English judgment, or, more strictly, to the right acquired under it.<sup>1</sup> But whether, to what extent, and by what means, a foreign, *e.g.*, a French or Victorian Court, will enforce a right acquired under an English judgment, is a question not of English but of foreign law.

*Exception.*—An English judgment for any debt, damages, or costs may be rendered operative in Ireland or Scotland by registration of a certificate thereof in accordance with the provisions of Rule 104.<sup>2</sup>

<sup>1</sup> See Intro., pp. 25, 26, *ante*.

<sup>2</sup> See chap. xvii., Rule 104, *post*, as to the extension of certain judgments *in personam* throughout the United Kingdom; and Judgments Extension Act, 1868 (31 & 32 Vict. c. 54).

(B) ENGLISH BANKRUPTCY<sup>1</sup> AND WINDING-UP OF COMPANIES.<sup>2</sup>

## I. BANKRUPTCY.

(i) *As an Assignment.*<sup>3</sup>

RULE 68.<sup>4</sup>—An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1883 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables<sup>5</sup> (land),

(2) movables,<sup>6</sup>

whether situate in England or elsewhere.

## Comment.

Under the Bankruptcy Act, 1883, the bankrupt's "property"<sup>7</sup> vests, on his being adjudged bankrupt, in the trustee for the benefit of his creditors; and "property," as defined by the Act, "includes "money, goods, things in action, land, and every description of "property, whether real or personal, and whether situate in "England or elsewhere; also obligations, easements, and every "description of estate, interest and profit, present or future, vested "or contingent, arising out of or incident to property as above "defined."<sup>8</sup>

<sup>1</sup> For the Court's jurisdiction in Bankruptcy, see chap. viii., p. 277, *ante*.

<sup>2</sup> For the Court's jurisdiction in Winding-up of Companies, see chap. viii, p. 297, *ante*.

<sup>3</sup> See the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20, sub-s. 1, with which read sects. 2, 43—49, 54, and 168. See, generally, as to the extra-territorial effect of bankruptcy as an assignment, Westlake (4th ed.), chap. vi., pp. 148—176; Figgott (2nd ed.), chap. x., pp. 325—340; Nelson, pp. 166—171; Phillimore, ss. 765—779; Foote (3rd ed.), pp. 318—330; Goudy, *Law of Bankruptcy in Scotland* (2nd ed.), chap. xlviii., pp. 631—638; Story, ss. 405—422.

Westlake's treatment of this topic is full, and deserves special attention.

<sup>4</sup> See the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54, 168; Baldwin (9th ed.), p. 261.

<sup>5</sup> For definition of "immovables," see pp. 68, 74, 75, *ante*.

<sup>6</sup> For definition of "movables," see pp. 68, 74, 75, *ante*.

<sup>7</sup> With certain limited exceptions, which have nothing to do with the rules of private international law, *e.g.*, property held by the bankrupt in trust for another person, or tools or wearing apparel of the bankrupt, his wife and children. See Bankruptcy Act, 1883, s. 44.

<sup>8</sup> See Bankruptcy Act, 1883, s. 168.

Hence, speaking generally, the bankruptcy (*i.e.*, the debtor's being adjudicated a bankrupt) transfers to the trustee, as far as an Act of Parliament can accomplish this result, all the bankrupt's property, whatever its situation, and this irrespective of the bankrupt's domicile or nationality.<sup>1</sup> The bankruptcy, moreover (except in the case of certain *bonâ fide* transactions without notice specially protected by the bankruptcy law),<sup>2</sup> relates or dates back, as far as the title of the trustee is concerned, to the "commencement of the bankruptcy," and by this term is meant the time of the act of bankruptcy, or (if the bankrupt is proved to have committed more acts of bankruptcy than one) of the first act of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition.<sup>3</sup> And this doctrine of relation applies to all property of the bankrupt, wherever situate, at any rate within the British dominions.<sup>3</sup>

The property so vested must be in strictness "property of the bankrupt;" and property which once belonged to the bankrupt, if it has before the commencement of the bankruptcy become already vested in some other person, *e.g.*, in the trustee under a Scotch bankruptcy,<sup>4</sup> is not the property of the bankrupt, and does not vest in the trustee under the English bankruptcy.<sup>5</sup>

When, further, a bankruptcy in one country is an assignment of property situate in another, it passes the property subject, speaking generally, to any charge acquired thereon prior to the bankruptcy under the laws of the country where the property is situate,<sup>6</sup> and subject also to the requirements, if any, of the local law as to the conditions necessary to effect a transfer of such property.<sup>7</sup>

<sup>1</sup> See Foote, pp. 318, 319.<sup>f</sup> Under the Bankruptcy Act, 1883, English Courts give to an English bankruptcy a wider effect than they would independently of Acts of Parliament (see Rule 109) give to a foreign bankruptcy. (See Rules 110—112, *post.*) See *Sill v. Worswick* (1791), 1 H. Bl. 665; *Selkrig v. Davis* (1814), 2 Rose, 291; *Royal Bank of Scotland v. Cuthbert* (1813), 1 Rose, 462. Compare *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640.

<sup>2</sup> Bankruptcy Act, 1883, s. 49.

<sup>3</sup> See chap. xxix. for the application of special rules of bankruptcy as against foreign creditors.

<sup>4</sup> See Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), s. 102

<sup>5</sup> Compare Nelson, p. 169.

<sup>6</sup> See Baldwin (9th ed.), pp. 265—267, citing *Sill v. Worswick* (1791), 1 H. Bl. 665; *Hunter v. Potts* (1791), 4 T. R. 182.

<sup>7</sup> *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460, 467; *Ex parte Rogers* (1881), 16 Ch. D. (C. A.) 665, 666, dictum of Jessel, M. R.; Westlake (4th ed.), p. 165; *Jeffery v. M'Taggart* (1817), 6 M. & S. 126; and Bankruptcy Act, 1883, s. 54, with which compare the Bankruptcy (Scotland) Act, 1856, s. 102.

Hence an English bankruptcy, though it transfers to the trustee a bankrupt's immovable and movable property situate in England or elsewhere, "only passes," it has been laid down, "immovable property in the colonies according to the law of the colonies;"<sup>1</sup> and this dictum, though confined to immovable property and to property in the colonies, applies apparently to movable property and to property situate in any foreign country.

(1) *As to immovables*.—In so far as the matter does not depend on any Act of Parliament, our Courts have always held that the effect of a bankruptcy is, as regards immovables, purely territorial, and that, therefore, a bankruptcy under the law of England is no more an assignment to the assignee or trustee of land—*e.g.*, in Victoria or in France<sup>2</sup>—than a bankruptcy in France is an assignment of land in England, or a bankruptcy in Victoria is an assignment of land either in England or in New Zealand.<sup>3</sup>

This principle, however, as far as an English bankruptcy is concerned, has been modified or abrogated by successive Bankruptcy Acts.

"Under the Act of 1849 [12 & 13 Vict. c. 106], s. 142," writes Mr. Justice Williams, "it was only real property within the dominions of Her Majesty which vested in the assignee for the creditors. The Act of 1869 [32 & 33 Vict. c. 71] contained no express provision as to the locality of real property, but did not seem to be intended to alter the law. At all events, under that Act, as under the Act of 1849, and now under the principal Act, real property in all Her Majesty's dominions vests in the trustee.<sup>4</sup> The present Act . . . vests real property wherever situate; but, inasmuch as real property is governed everywhere by the *lex loci rei sitæ*, the alteration in the present Act will probably be of little or no practical effect, since the order of adjudication will not, it is presumed,<sup>5</sup> be recognised in foreign<sup>6</sup> countries as operating to transfer to the trustee real property there

<sup>1</sup> *Ex parte Rogers* (1881), 16 Ch. D. (C. A.) 665, 666, per Jessel, M. R.

<sup>2</sup> See *Selkrig v. Davis* (1814), 2 Rose, 97, 291.

<sup>3</sup> See *Cockrell v. Dickens* (1840), 3 Moo. P. C. 98; *Ex parte Blakes* (1787), Cox, 398; Westlake (4th ed.), pp. 168, 169.

<sup>4</sup> *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460.

<sup>5</sup> This presumption is not now invariably justifiable. In some foreign countries an English bankruptcy might be allowed to operate on immovables situate in such countries. See Westlake, p. 170: and compare *Hoffmann v. Mack*, *Journal de Droit Int. Privé*, 1879, vi. p. 77, cited Piggott, p. 484.

<sup>6</sup> "Foreign" here probably means not forming part of the British dominions.

“ situate. Even in the case of real property outside England within  
 “ Her Majesty’s dominions, as, for instance, in the colonies, such  
 “ property will only pass according to the law of the colony where  
 “ it is situate,<sup>1</sup> and the trustee, therefore, in a colony where  
 “ registration is necessary to pass the title, will get no title until  
 “ registration. The property will only vest in the trustee subject  
 “ to any requirements prescribed by the local law as to the con-  
 “ ditions necessary to effect a transfer of real estate situate in the  
 “ locality.<sup>2</sup> Section 168 [of the Bankruptcy Act, 1883] will,  
 “ however, probably make a practical alteration in one way even  
 “ as to real property situate abroad, that is to say, that in cases  
 “ where the bankrupt is personally within the jurisdiction of the  
 “ Court, he may be ordered, under section 24, to execute a valid  
 “ conveyance of his real property according to the form required  
 “ by the law of the country where such property is situate;  
 “ whereas under the former statutes, which did not vest real  
 “ property abroad, it was held that the bankrupt was under no  
 “ obligation, legal or equitable, to execute<sup>3</sup> a conveyance.”<sup>4</sup>

The effect, therefore, of an English bankruptcy on foreign immovables, or, in other words, foreign land, may be summed up as follows :—

The bankruptcy operates as an assignment of any land situate within the British dominions, *e.g.*, in Victoria or Canada,<sup>5</sup> but if so situate, subject to any requirements of the local laws as to the conditions necessary to effect the transfer of real estate.

The bankruptcy operates as an assignment of land situate in a country outside the British dominions, *e.g.*, Italy, in so far, and in so far only, as Italian law treats an English bankruptcy as an assignment of Italian land. A trustee under an English bankruptcy acquires in England a title to land of the bankrupt in Italy if his title is recognised by Italian law, and acquires no title to it at all if his title is not recognised by Italian law; in which case, it may be added, the Italian land does not form part of the fund available for distribution among the English creditors.<sup>6</sup>

<sup>1</sup> *Ex parte Rogers* (1881), 16 Ch. D. (C. A.) 665.

<sup>2</sup> *Candler v. Colonial Secretary of Lagos*, [1891] A. C. 460.

<sup>3</sup> *Selkrig v. Davis* (1814), 2 Rose, 97, 291.

<sup>4</sup> Williams, *Bankruptcy* (8th ed.), p. 216.

<sup>5</sup> See the Bankruptcy Act, 1883, ss. 117—119, as to the aid to be given to each other by Bankruptcy Courts in different parts of the British dominions.

<sup>6</sup> See *Cockerell v. Dickens* (1840), 3 Moo. P. C. 98. Mr. Baldwin arrives, it is conceived, at the same conclusions. “All such real property,” he writes, “of the

(2) *As to movables*.—An English bankruptcy operates as an assignment to the trustee of the movables (*e.g.*, goods) of the bankrupt situate in any part of the British dominions, and also, in so far as our Courts can determine the matter, of his movables situate in countries not forming part of the British dominions.

The extra-territorial effect of an English bankruptcy gives rise to several questions:—

*Question 1.*—What is the position in England of a creditor who, after the commencement of the bankruptcy, obtains in a foreign country payment of debts due to him from the bankrupt?

English Courts cannot directly determine what shall be, in a foreign country, the effect of an English bankruptcy. They may, however, be called upon indirectly to pronounce a decision on the point. *X*, a creditor of the bankrupt, may, after the commencement of the bankruptcy, obtain in a foreign country payment of debts due to him from the bankrupt. *X* may then come to England and be sued here by *A*, the trustee in bankruptcy, for the money so obtained. Our Courts must then decide between the title of *X*, the creditor, and *A*, the trustee, or in substance must determine what is the effect of an English bankruptcy in a foreign country. From the cases decided on the subject, it may, with considerable probability, but not with absolute certainty, be inferred<sup>1</sup> that English Courts adhere to the following principles:—

“bankrupt as is situate in any portion of His Majesty’s dominions passes to his trustee here; though, if situate in the Colonies, subject to any requirement, prescribed by the local law, as to the conditions there necessary to effect a transfer of real estate (*Callender, Sykes & Co. v. Colonial Secretary of Lagos*, [1891] A. C. 460; and see *Ex parte Rogers* (1881), 16 Ch. D. 665, 666, language of Jessel, M. R.). But if the property be not situate within any part of His Majesty’s dominions, it will not pass, unless the trustee has a claim to it under “the law of the particular foreign country where situate.” Baldwin (9th ed.), pp. 266, 267.

<sup>1</sup> This inference, grounded on the three cases, *Hunter v. Potts* (1791), 4 T. R. 182; *Sill v. Worswick* (1791), 1 H. Bl. 665; *Philips v. Hunter* (1795), 2 H. Bl. 402, which were decided at a time when the bankruptcy law was different from what it is at present, and when points connected with the conflict of laws had been little studied, is to a certain extent conjectural. The necessary result of these cases, though not all which may be inferred from them, is thus stated by Bell: “In England . . . it is held (1) That an English creditor who, having notice of the bankruptcy, makes affidavit in England in order to proceed abroad, cannot retain against the assignees what he recovers; (2) That a creditor in the foreign country would not, if preferred by the laws of that country, be obliged to refund in England; and (3) That, at all events, such a creditor cannot take advantage of the bankrupt laws in England without communicating the benefit of his foreign proceedings.” 2 Bell, Commentaries on the Law of Scotland (McLaren’s ed.), p. 573.

*First.* Any creditor who, after the commencement of the English bankruptcy,<sup>1</sup> without legal process obtains in a foreign country payment of a debt due to him from the bankrupt, may, when sued in an English Court by the trustee, be compelled to refund the money paid to him.<sup>2</sup>

*Secondly.* If any creditor, after the commencement of the English bankruptcy, recovers in a foreign country a debt due to him from the bankrupt, the effect of such recovery will depend on the answer to the question whether the foreign Court did or did not determine that the title of the creditor was good as against the title of the trustee.

If the creditor recovered the debt under circumstances which did not necessarily involve the preference by the foreign Court of his title to that of the trustee (as where the creditor recovered the money due to him from the bankrupt without notice to the Court of the fact of the bankruptcy), then the creditor is to be held, when sued here, to have recovered the money to the use of the trustee, and is liable to refund it. There would appear in this case to be no difference between the position of an English and of a foreign creditor.<sup>3</sup>

If the creditor recovered the debt under circumstances which necessarily involved the preference by the foreign<sup>4</sup> Court of his title to that of the trustee, as where the fact of the bankruptcy is brought before the Court, or the trustee takes part in the proceedings, then the creditor, though the decision of the foreign Court is in point of principle erroneous, has the advantage of the judg-

<sup>1</sup> See Bankruptcy Act, 1883, s. 43. *Ex parte D'Obree* (1803), 8 Ves. 81. As to what acts constitute acts of bankruptcy, see Rule 59, p. 293, *ante*.

It would seem that the rules of the English Bankruptcy Act as to relation apply at any rate to transactions taking place in foreign countries, such as Scotland or Victoria, which form part of the British dominions. See, further, chap. xxix., comment on Rule 180, p. 655, *post*; but *conf.* Goudy (2nd ed.), p. 641.

<sup>2</sup> The authorities show "that the operation of the bankrupt laws, with respect to the personal property of the bankrupt, when that property is brought into this country by any one who has obtained it, is to carry a right to recover it to the assignees for the benefit of all the creditors." *Sill v. Worswick* (1791), 1 H. Bl. 665, 694, per Loughborough, L. C. J.

<sup>3</sup> See *Sill v. Worswick* (1791), 1 H. Bl. 665, 693; *Philips v. Hunter* (1795), 2 H. Bl. 402.

<sup>4</sup> This must almost necessarily be a "foreign" Court in the strictest sense of the term, *i.e.*, a Court of a country not forming part of the British dominions; for the Court of any country forming part of the British dominions, *e.g.*, a colonial Court, must under the Bankruptcy Act, 1883, prefer the title of the trustee. *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460.



ment in his favour,<sup>1</sup> and, if sued here by the trustee, cannot be compelled to refund the money recovered in the foreign country. "It by no means follows," says Lord Loughborough, "that a commission of bankrupt has an operation in another country, against the law of that country. I do not wish to have it understood that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using) that a creditor in that country, not subject to the bankrupt laws [of England], nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided."<sup>2</sup>

*Thirdly.* A creditor who has recovered or received abroad any part of the bankrupt's movable property, or any part of his

<sup>1</sup> This is almost involved in the principle of such cases as *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. (Ex.) 350; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, which, though they have no direct reference to bankruptcy, determine that a title acquired under a foreign judgment is valid here. See Phillimore (3rd ed.), s. 770, pp. 617, 618, and compare Foote (3rd ed.), pp. 322, 323.

<sup>2</sup> *Sill v. Worswick* (1791), 1 H. Bl. 665, 693, per Loughborough, L. C. J.

*Westlake's view.*—Mr. Westlake places a different interpretation on the decided cases, and his view deserves the most careful consideration.

"§ 142. A British creditor," he writes, "or one domiciled in England, or one who in his character of creditor must be regarded as English because the debt is owed to a house of business in England of which he is a member, and who after the commencement of an English bankruptcy or winding-up, and not by virtue of any charge prior to the bankruptcy or winding-up or of a judgment *in rem*, obtains payment out of the bankrupt's or company's movables in a non-British country, must pay over the amount to the trustees in the bankruptcy or the liquidator, whether or not he seeks to receive dividends on the residue, if any, of his debt, whether or not the payment was obtained by legal proceedings, and whether or not the title of the trustees or liquidator was asserted in such proceedings, if any. . . .

"§ 143. A creditor not being such as is described in the last §, who, after the commencement of an English bankruptcy or winding-up, and not by virtue of any charge prior to the bankruptcy or winding-up or of a judgment *in rem*, obtains payment out of the bankrupt's or company's movables in a non-British country, must account for such payment if he seeks to receive dividends

immovable property, which forms part of the fund available for distribution among his creditors, will not be allowed to prove under the English bankruptcy unless he brings into the common fund the part so acquired.<sup>1</sup>

“If a particular creditor who is able to lay hold of assets of the bankrupt abroad comes here to share with the other creditors, he must bring into the estate here that which the law of the foreign country has given him over the other creditors.”<sup>2</sup>

This principle applies as well to an alien as to a British subject; it applies whether the advantage be gained by means of an attachment, by proof under a foreign bankruptcy, or otherwise. It applies, however, only to property which otherwise would have passed, or which at any rate according to the view of our Courts ought to have passed, to the trustee, so as to form part of the fund available for distribution among the creditors under the English bankruptcy.<sup>3</sup> It does not, therefore, apply to immovable property of the bankrupt's situate in a country beyond the limits of the British dominions, if such property does not pass to the trustee under the law of such country, *e.g.*, France.<sup>4</sup>

*Question 2.*<sup>5</sup>—Can the Courts of any country forming part of the British dominions treat an English bankruptcy as invalid, and, therefore, as having no extra-territorial effect, on the ground that the English Bankruptcy Court has exceeded the jurisdiction which,

“on the residue, if any, of his debt, but may otherwise retain it; and this whether or not the payment was obtained by legal proceedings, and whether or not the title of the trustees or liquidator was asserted in such proceedings, if any.”

Westlake (4th ed.), ss. 142, 143. pp. 171, 172. See Story, s. 409. But contrast Foote (3rd ed.), pp. 322—323.

Mr. Westlake's view, which makes the right of a creditor to retain the payment he has obtained in effect depend on his “national character,” may be sound, but is open to some objections. His doctrine is not, it is submitted, established by any reported case. His definition of what I have termed “national character” is vague. His doctrine, lastly, is not easily reconcilable with the respect now paid to a foreign judgment *in rem*. See Foote, p. 323.

<sup>1</sup> See *Ex parte Wilson* (1872), L. R. 7 Ch. 490; *Selkrig v. Davis* (1814), 2 Rose, 291; *Cockerell v. Dickens* (1840), 3 Moore, P. C. 98; Westlake (4th ed.), pp. 171, 172.

<sup>2</sup> *Ex parte Wilson* (1872), L. R. 7 Ch. 490, 493, judgment of James, L. J.

<sup>3</sup> *Cockerell v. Dickens* (1840), 3 Moore, P. C. 98.

<sup>4</sup> The principles governing the position of the creditor of a bankrupt, who in a foreign country obtains payment of a debt, apply to the position of a creditor who in a foreign country obtains property of the bankrupt, *e.g.*, movables, forming part of the fund distributable among the creditors. See language of Loughborough, L. C. J., in *Sill v. Worswick* (1791), 1 H. Bl. 665, 694, cited p. 334, note 2, *ante*.

<sup>5</sup> Exactly the same question in principle may be raised as to the right of an English Court to treat a Scotch or Irish bankruptcy as invalid.

in the opinion of, *e.g.*, Scotch or Victorian judges, is conferred upon it by the English Bankruptcy Act?

The answer to this question, should it ever call for decision, probably is that any Court throughout the British dominions must treat an English bankruptcy, as far at any rate as the authority of the Court is concerned, as valid. If the English Court has misconstrued the Act, and made bankrupt a debtor whom, *e.g.*, as not being a debtor subject to the English bankruptcy law,<sup>1</sup> the Court has no jurisdiction to adjudge bankrupt, the right course for any person aggrieved by the error of the Court is to appeal to the proper English appellate tribunals, and the Courts of Scotland or of Victoria will not, it is conceived, act in effect as Courts of Appeal from the decision of an English Bankruptcy Court. The correctness of this suggested reply is, however, by no means certain; nor does it, even if correct, necessarily apply to objections to the exercise of bankruptcy jurisdiction by the English Court, which are based on the adjudication of bankruptcy having been pronounced under a mistaken view of the facts, as where the English Court holds that the bankrupt is domiciled in England, whereas he is, in fact, domiciled in Scotland, or which are based on the ground that the adjudication of bankruptcy was obtained by fraud.

### Illustrations.

In the following illustrations *N* is a debtor made bankrupt under the English Bankruptcy Act, 1883.

1. *N*, at the time of his being adjudicated bankrupt, possesses movables, *viz.*, money and debts, owing to him in Scotland, Victoria, and France. The bankruptcy is an assignment to the trustee in bankruptcy of such money and debts.<sup>2</sup>

2. *N*, at the time of his being adjudicated bankrupt, possesses land in Scotland, the Isle of Man, and in Victoria. The bankruptcy is an assignment to the trustee of such land.<sup>3</sup>

3. *N*, at the time of his being adjudicated bankrupt, possesses

<sup>1</sup> See chap. viii., Rule 54, p. 278, *ante*. The supposed question might have arisen under the Act of 1869 with regard to a case such as *Ex parte Crispin* (1873), L. R. 8 Ch. 374, or, under the Bankruptcy Act, 1883, with regard to a case such as *In re Pearson*, [1892] 2 Q. B. (C. A.) 263, had the decision of the English Court been against the appellant.

<sup>2</sup> See p. 333, *ante*.

<sup>3</sup> See pp. 331, 332, *ante*.

land and railway shares in a British colony, under the law of which the transfer of the land and of the shares is not complete without registration. The bankruptcy is an assignment to the trustee of the right to the land and shares, subject to the necessity for registration, and the title of the trustee is not complete until the transfer is registered.<sup>1</sup>

4. *N*, at the time of his being adjudicated bankrupt, possesses land in Italy. The English bankruptcy is an assignment of such land to the trustee in so far as it is an assignment under the law of Italy, but not otherwise.<sup>2</sup>

5. *N*, after the commencement of the bankruptcy, but a month before he is adjudicated bankrupt, possesses goods and money in Scotland and in Victoria. The bankruptcy is an assignment to the trustee in bankruptcy of such goods and money to the same extent to which it would have been an assignment if the goods and money had been situate<sup>3</sup> in England.

6. *X*, a creditor, obtains without legal process in France from *N*, after he is adjudicated bankrupt, payment of a debt due from *N* to *X*. On *X*'s coming to England he is sued by *A*, the trustee, for the amount of the money paid him by *N*. *A* can recover from *X* the money paid by *N*.<sup>4</sup>

7. After *N* is adjudicated bankrupt *X* recovers by proceedings in a Pennsylvanian Court 100*l.* due from *N* to *X*. The Court has no notice of the bankruptcy, and there is nothing to show that the Court intended to give a judgment as to *X*'s title, as against *A*, the trustee in bankruptcy. *X*, on coming to England, is sued by *A* for the 100*l.* *A* can recover the 100*l.* as money received to his use by *X*.<sup>5</sup>

8. After *N* is adjudicated bankrupt, *X*, an American domiciled in Pennsylvania, recovers by proceedings in a Pennsylvanian Court 100*l.* due from *N* to *X*. *Y*, an Englishman domiciled in England, also recovers by proceedings in the same Court 50*l.* due to him from *N*. The Court has, in both cases, notice of the bank-

<sup>1</sup> See pp. 330, 331, *ante*, and *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460.

<sup>2</sup> See pp. 331, 332, *ante*.

<sup>3</sup> As to the effect of English bankruptcy on antecedent transactions, see Bankruptcy Act, 1883, ss. 43, 45—49.

<sup>4</sup> Conf. judgment of Lord Loughborough in *Sill v. Worswick* (1791), 1 H. Bl. 665, 689.

<sup>5</sup> *Sill v. Worswick* (1791), 1 H. Bl. 6 5, 689; *Philips v. Hunter* (1795), 2 H. Bl. 402.

ruptcy, and holds that the title of each of the creditors is better than the title of *A*, the trustee in bankruptcy. *X* and *Y* come to England, and *A*, the trustee, sues each of them for the money obtained under the Pennsylvanian judgments. *A* certainly cannot recover the 100% from *X*, the American. Probably he cannot recover the 50% from *Y*, the Englishman, but this is not certain.<sup>1</sup>

9. *X*, the American creditor, under the circumstances stated in Illustration 8, attempts to prove under *N*'s bankruptcy for a further sum of 500% due from *N* to *X*. He will not be allowed to prove unless he pays over to *A*, the trustee, the 100% recovered.<sup>2</sup>

(ii) *As a Discharge.*

RULE 69.<sup>3</sup>—A discharge under an English bankruptcy from any debt or liability is, in any country forming part of the British dominions, a discharge from such debt or liability wherever or under whatever law the same has been contracted or has arisen.

## II. WINDING-UP.

RULE 70.<sup>4</sup>—The winding-up of a company impresses the whole of its property with a trust for application in

<sup>1</sup> If Mr. Westlake's view of the law be correct, *A* can recover the 50% due from *Y*. See p. 335, note 2, *ante*.

<sup>2</sup> See pp. 335, 336, *ante*.

<sup>3</sup> See *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Edwards v. Ronald* (1830), 1 Knapp, 359. For the comment on and illustrations of this Rule, see chap. xviii. Rules 114–117, *post*, where the whole of the Rules as to the extra-territorial effect of bankruptcy as a discharge are laid down and explained.

<sup>4</sup> See Westlake (4th ed.), p. 165; *In re Oriental India Steam Co., Ex parte Souda Rail. Co.* (1874), L. R. 9 Ch. 557, and p. 560, judgment of Mellish, L. J., and p. 559, judgment of James, L. J.; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. 55; (C. A.) 460. Compare Lindley, *Company Law* (6th ed.), p. 899. See, further, the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), especially as to liquidator, ss. 4, 12–24. It is, however, apparently suggested by Westlake, p. 165 and p. 162, that this rule applies only where the company is one which is domiciled in England, *i.e.*, “which derives its incorporation or other legal existence from the law of England, or from British law as connected with “England rather than with any other part of the Empire.” Westlake, p. 162, s. 131. As to a company which is not domiciled in England, “it is difficult to “suppose,” he writes, “that either its movable or its immovable property, situate “out of England, could be strictly considered as passing by such winding-up, “though it might very likely, for convenience, be administered in the English “Court as long as there was not a concurrent winding-up in the company's “domicil.” Westlake, p. 168. As to jurisdiction to wind up a company, see Rules 60, 61, pp. 297, 300, *ante*.

the course of the winding-up, for the benefit of the persons interested in the winding-up, if such persons are subject to the jurisdiction of the Court.

### Comment.

The winding-up of a company under the Companies Acts impresses the whole of the assets of the company with a trust for application in the course of the winding-up,<sup>1</sup> and the English Court will, in as far as lies within its power, cause the property of the company to be treated as trust property, to be dealt with for the benefit of the persons interested in the winding-up. Thus, where a company having its chief office in England, but carrying on business in India, was ordered to be wound up, judgment creditors in this country who had proved under the winding-up were not allowed to attach property of the company in India, and the law was thus laid down:—

“ The winding-up is necessarily confined to this country. . . .  
 “ The English Act of Parliament has enacted that, in the case of a winding-up, the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company, and, being so, it has ceased to be liable to be seized by the execution creditors of the company.

“ There may, no doubt, be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes not be disposed to assist this Court, or take the same view of the law as the Courts of this country have taken as to the proper mode of dealing with such companies, and also with such assets. If so, we must submit to these difficulties when they occur.

“ In this particular case there is no such difficulty. There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one *cestui que trust* getting possession of the

<sup>1</sup> Compare Westlake, pp. 165, 166.

“trust property after the property had been affected with notice of the trust. If so, that *cestui que trust* must bring it in for distribution among the other *cestuis que trust*. So I, too, am of opinion that these creditors cannot get any priority over their fellow creditors by reason of their having got possession of the assets in this way. The assets must be distributed in England upon the footing of equality.”<sup>1</sup>

“No doubt winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in the ninety-fifth section [of the Companies Act, 1862 (25 & 26 Vict. c. 89)] is that from the time of the winding-up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, and, *as far as this Court has jurisdiction*, no one creditor can be allowed to have a larger share of the assets than any other creditor.”<sup>2</sup>

The reservation implied in the words in italics, and to which expression has been given in Rule 69, should be noted. The Rule applies to all creditors within the jurisdiction of the Court. Such are—(1) creditors domiciled in any part of the United Kingdom, and (2) any colonial creditor, *e.g.*, an inhabitant of Victoria, or any strictly foreign creditor, *e.g.*, a Frenchman who, though not domiciled in England, has either proved for his debt under the winding-up, or assented to a deed of arrangement. A creditor, therefore, coming under any of these classes, must give up for the benefit of the other creditors, any advantage he may have obtained for himself by proceedings in a British colony, or in a strictly foreign, *e.g.*, French, Court.<sup>3</sup> But a colonial or a foreign creditor

<sup>1</sup> *In re Oriental Inland Steam Co., Ex parte Seinde Rail. Co.* (1874), L. R. 9 Ch. 557, 558, 559, judgment of James, L. J. See *Flack's Case*, [1894] 1 Ch. 369.

<sup>2</sup> *In re Oriental Inland Steam Co.* (1874), L. R. 9 Ch. 557, 560, judgment of Mellish, L. J.

<sup>3</sup> *Ibid.* It is thus possible to reconcile *In re Oriental Inland Steam Co.* (1874), L. R. 9 Ch. 557, with *New Zealand Loan and Mercantile Agency Co. v. Morrison*,

who, not being domiciled in the United Kingdom, has neither proved under the liquidation nor assented to a deed of arrangement, may retain any benefit he has obtained by proceedings in a colonial or foreign Court, even though taken after the commencement of the liquidation in England.<sup>1</sup>

**RULE 71.**—An arrangement under the Companies Act, 1862, and the Acts amending the same, which frees a debtor from liability, is not in a British colony a discharge from liability for a debt there incurred.<sup>1</sup>

#### Comment and Illustration.

“It is impossible to contend that the Companies Acts as a whole extend to the colonies, or are intended to bind the colonial Courts. The colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies, and thereby overrule, qualify, or add to their own legislation on the same subject.

\* \* \* \* \*

“If, as their lordships hold, the Arrangement Act of 1870 does not extend to the colonies, the proceedings in the English Court are for this purpose proceedings in a foreign Court, and cannot be pleaded in Victoria as a defence to an action by a Victorian creditor.”<sup>2</sup>

*X & Co.* is a company incorporated under the English Companies Acts, and has its head office in England. *X & Co.* incurs in Victoria a debt of 3,000*l.* to *A.* After the debt is incurred an order is made, on the application of *X & Co.*, by the English High Court for winding-up the company. A scheme of arrangement is made in accordance with the Companies Acts, and under

[1898] A. C. 349, 357, 359, though probably the judgment in the former case may have been given under the view that the principle of *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, was applicable to a winding-up under the Companies Acts, and placed the property of the debtor in the colonies under the management of the liquidator, as to which see Rule 70, p. 339, *ante*.

<sup>1</sup> *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349.

<sup>2</sup> *Ibid.*, 349, 357, 359, judgment of Privy Council. See also *Gibbs v. Société des Metaux* (1890), 25 Q. B. D. (C. A.) 399.



these Acts is binding on all creditors. *A*, after the arrangement is made, brings an action against *X & Co.* in a Victorian Court for the 3,000*l.* The arrangement under the Companies Acts does not in Victoria discharge *X & Co.* from liability for the debt.<sup>1</sup>

### (C) ENGLISH GRANT OF ADMINISTRATION.<sup>2</sup>

RULE 72.<sup>3</sup>—An English grant has no direct operation out of England.

This Rule must be read subject to Rules 76 to 78.<sup>4</sup>

#### Comment.

“It must not be understood . . . that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here [or of letters of administration] can extend to them, so as to give the executor the legal right to recover them abroad. For the probate was [or letters of administration were] never granted except for goods which at the time of the death were within the jurisdiction of the Ordinary who made the grant.”<sup>5</sup>

An English grant does not, in short, of itself enable the personal representative even of a man who has died domiciled in England to sue in a foreign Court.<sup>6</sup>

RULE 73.<sup>7</sup>—An English grant extends to all the

<sup>1</sup> *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349.

<sup>2</sup> *Williams, Executors*, 10th ed., 272—274, and especially, *Westlake*, pp. 118—120; *Foote*, pp. 285, 290, 291; *Nelson*, 202, 216, 217. For jurisdiction to make a grant, see Rules 62 and 63, pp. 303, 307, *ante*.

<sup>3</sup> See *Williams, Executors*, pp. 272—274; *Atkins v. Smith* (1740), 2 Atk. 63.

<sup>4</sup> See especially, as to extension of English grant to Ireland and to Scotland respectively, Rules 76, 77, pp. 350, 351, *post*, and as to extension to colonies, compare Rule 78, p. 352, *post*.

<sup>5</sup> *Williams, Executors*, p. 273.

<sup>6</sup> *Ibid.*, p. 274.

<sup>7</sup> *Whyte v. Rose* (1842), 3 Q. B. 493, 507; *Scarth v. Bishop of London* (1828), 1 Hagg. Ecc. 625. “An English grant of probate or administration properly obtained here is by the English Courts regarded as extending to all the personal property of the deceased, wherever situate at the time of his death, at least in such a sense that a representative duly constituted in England may sue in England in relation to foreign assets.” *Foote*, p. 286. This sentence accurately sums up the position of an English administrator, except that the word “movables” ought apparently to be substituted for “personal property,” as an English administrator could not bring an action in England in relation, *e.g.*, to leaseholds situate in New York. See Rule 39, p. 201, *ante*.

movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who has obtained an English grant (who is hereinafter called an English administrator) may—

- (1) sue in an English Court in relation to movables of the deceased situate in any foreign<sup>1</sup> country ;
- (2) receive<sup>2</sup> or recover in a foreign country movables of the deceased situate in such country (?).

#### Comment.

Though the jurisdiction of the Court to make a grant arises from there being property of the deceased (however small in amount) situate in England,<sup>3</sup> an ordinary grant<sup>4</sup> constitutes the administrator the representative of the deceased, not only in respect of the property the presence of which in England gave the Court jurisdiction, but also in respect of the whole of the deceased's movable property. No doubt there is some difficulty in determining what is the precise effect of an English grant on property situate abroad, and the question what is its effect is further considered in the comment on Rule 75.<sup>5</sup> Thus much, however, appears to be certain. An English administrator can sue in an English Court in respect of movables of the deceased situate abroad, *e.g.*, in Victoria or in France; nor would it here be any answer to an action by the administrator in respect of such movables that the deceased did not die domiciled in England. The administrator, further, has, as far as English Courts are concerned, the right to

<sup>1</sup> And of course if situate in England.

<sup>2</sup> See *Atkins v. Smith* (1740), 2 Atk. 63.

<sup>3</sup> See Rule 63, p. 307, *ante*.

<sup>4</sup> *I.e.*, a grant which is not in any way limited. See p. 307, note 2, *ante*.

“ All personal [*i.e.*, movable] property follows the person, and the rights of a person constituted in England representative of a party deceased, domiciled in England, are not limited to the personal property in England, but extend to such property wherever locally situate. So, where general probate has been granted in England of the will of a domiciled Scotchman, the ordinary judgment may be obtained here for administration of the personal estate, without limiting it to the English assets.” Walker & Elgood (4th ed.), pp. 108, 109, citing *Stirling-Maxwell v. Cartwright* (1879), 11 Ch. D. (C. A.) 522; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34.

<sup>5</sup> See p. 346, *post*.

receive or recover in a foreign country movables of the deceased. But it of course depends on the law, not of England, but of the foreign country, whether he has there, in accordance with its law, the right to receive such movables.

### Illustrations.

In the following illustrations *A* is the administrator of *T* under an English grant:—

1. *X*, a Frenchman resident in France, has before *T*'s death made a contract with *T*, which was to be performed in England, and has broken it. *A* can bring an action against *X* in England for the breach of contract.

2. *X*, a Frenchman resident in France, converts in France goods of *T*. *X* comes to England. *A* can sue *X* in England for the conversion.<sup>1</sup>

3. *X*, an American living in New York, owes 100*l.* to *T*. *A* has a right<sup>2</sup> to receive payment of the debt from *X*, and *A* has also a right to recover payment of the 100*l.* from *X* by any proceedings in the Courts of New York which are allowed by the law of New York, *e.g.*, by obtaining in New York a grant of administration, and bringing an action there against *X*.

RULE 74.<sup>3</sup>—When a person dies domiciled in England, the Courts of any foreign country ought, by means of a grant,<sup>4</sup> or otherwise, to enable the English administrator to act as personal representative of the deceased in such foreign country, in regard to any movable there situate.

### Comment.

An English Court has no power to dictate to the tribunals of foreign countries what is the course which they ought to pursue. According, however, to the doctrines of English law, the beneficial succession to a deceased person's movables is governed by the law of his domicile (*lex domicilii*),<sup>5</sup> and the Courts of his domicile have primary, though not exclusive, jurisdiction to determine the

<sup>1</sup> *Whyte v. Rose* (1842), 3 Q. B. 493, 506.

<sup>2</sup> *I.e.*, according to English law.

<sup>3</sup> *Atkins v. Smith* (1740), 2 Atk. 63; *Burn v. Cole* (1762), Ambl. 415.

<sup>4</sup> For meaning of "grant," see Rule 62, p. 303, *ante*.

<sup>5</sup> See chap. xxxi., Rules 183—187, pp. 664—680, *post*.

succession to such movables.<sup>1</sup> It follows, therefore, that the representative under an English grant of a deceased person who has died domiciled in England ought, in the opinion of English judges, to be placed by the Courts of any foreign country, where the deceased has left movable property, in a position there to represent the deceased. The claim, however, of the English administrator of a person who has died domiciled in England, to be made representative of the deceased in a foreign country, is by no means an absolute one. "The grant of probate," it has been laid down, "does not, of its own force, carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives, as, for instance, when a creditor gets letters of administration in the Court of the domicile."<sup>2</sup>

RULE 75.<sup>3</sup>—The following property<sup>4</sup> of a deceased person passes<sup>5</sup> to the administrator under an English grant:—

- (1) Any property of the deceased which at the time of his death<sup>6</sup> is locally situate<sup>7</sup> in England.<sup>8</sup>

<sup>1</sup> See chap. xvi., Rule 90, *post*; *Enohin v. Wylie* (1862), 10 H. L. C. 1; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; (1885) 10 App. Cas. 453.

<sup>2</sup> *Blackwood v. The Queen* (1882), 8 App. Cas. 82, 92, 93, judgment of Privy Council. See *In re Kloebe* (1884), 28 Ch. D. 175, 179, judgment of Pearson, J.

At the present day, at any rate, our Courts would not expect that any foreign, e.g., a colonial, Court should grant administration to the English administrator of a deceased person who did not die domiciled in England. See *Burn v. Cole* (1762), Ambl. 415, 416, language of Lord Mansfield, C. J.

<sup>3</sup> See 1 Williams, Executors (10th ed.), pp. 272—274; *Ibid.*, 1283—1289; Westlake (4th ed.), pp. 118—124; Foote (3rd ed.), pp. 285—291, 294; Nelson, pp. 202—217.

<sup>4</sup> For definition of "property," see Rule 62, p. 303, *ante*.

<sup>5</sup> Since the word "administrator" as here used includes an executor (see Rule 62, p. 303, *ante*), the term "passes" is not strictly correct; for the property of the deceased does not pass to the executor under the grant, but rather vests in him on the death of the testator (see p. 305, *ante*). Still, the language employed in the Rule is convenient and usual (compare Westlake, p. 118), and expresses what is meant, viz., that certain property belongs to, and must be accounted for by, the administrator or executor who has obtained a grant.

<sup>6</sup> See Walker & Elgood, pp. 149, 156 and 140 (2).

<sup>7</sup> As to local situation of property, see pp. 309—314, *ante*.

<sup>8</sup> See *Attorney-General v. Dimond* (1831), 1 Cr. & J. 356, 370, judgment of Lyndhurst, C. B.

- (2) Any movables of the deceased, or the proceeds of any property of the deceased, which, though not situate in England at the time of the death of the deceased, are received, recovered, or otherwise reduced into possession by the English administrator as such administrator.<sup>1</sup>
- (3) Any movables of the deceased which after his death are brought into England before any person has, in a foreign country where they are situate, obtained a good title thereto under the law of such foreign country (*lex situs*) and reduced them into possession.<sup>2</sup>

### Comment

All the property of the deceased, whether it consist of immovables<sup>3</sup> or of movables (*i.e.*, of land, goods, or choses in action), which at the time of his death<sup>4</sup> is locally situate<sup>5</sup> in England, passes to the English administrator, and this even though the property is not reduced into possession.<sup>6</sup> Foreign lands or immovables, on the other hand, do not pass under the English grant.

<sup>1</sup> See *Dowdale's Case* (1605), 6 Rep. 46b, *nom. Richardson v. Dowdale*, Cro. Jac. 55; Westlake, p. 123; Foote, p. 293. See as to right of English administrator to receive or recover debts or other movables, Rule 73, p. 343, *ante*.

<sup>2</sup> See chap. xxiv., Rule 143, *post*. and cases there cited, especially *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545, judgment of North, J. Contrast, however, Westlake, p. 119; Story, s. 516; and *Whyte v. Rose* (1842), 3 Q. B. 493, 506, *dicta* of Rolfe, B., and Parke, B.

For rights further of an English administrator, as against personal property in England in the hands of a foreign personal representative, see chap. xviii., Rule 121, and comment, *post*; and as to the title of a foreign personal representative to movables of the deceased, *Ibid.*, Rule 120, p. 447, *post*.

<sup>3</sup> See for a very limited and unimportant exception as to land which comes within the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4).

<sup>4</sup> See Rule 63, p. 307, *ante*.

<sup>5</sup> As to the local situation of property for the purpose of administration, see pp. 309—312, *ante*.

<sup>6</sup> This seems to follow from the Land Transfer Act, 1897, s. 1, taken together with the rules as to the incidence of probate duty, and the rules as to the jurisdiction of the Ecclesiastical Courts, on which the incidence to probate duty originally depended. (See pp. 312—314, *ante*.) See *Attorney-General v. Dimond* (1831), 1 Cr. & J. 356, 370, judgment of Lyndhurst, C. B.

An English administrator is apparently in some respects regarded by our Courts as the representative of the deceased (at any rate if he dies domiciled in England) as regards the whole of his movables. But it is certainly not the case that the whole of such movables, wherever situate, pass immediately to the English administrator under the grant.

In regard to the difficult question, what are the movables which do pass under an ordinary English grant, the following points may, it is submitted, though with some hesitation, be considered as pretty well established:—

(1) Any movable of the deceased, which at the time of his death<sup>1</sup> is locally situate in England, passes to the English administrator.

(2) When any movable<sup>2</sup> of the deceased is in fact received or recovered by the English administrator as such, it of course passes to him and forms part of the fund to be administered in England; and this is so whether the property is received, or recovered by action in England, or received, or recovered by action in a foreign country,<sup>3</sup> provided always in the latter case that the property, *e.g.*, goods or debts, come into the hands of the administrator in his character of English administrator. This limitation should be noted, for movables, *e.g.*, goods or money, of which an English administrator gets possession in a foreign country, but not in his character of English administrator, do not pass to him under the grant. Thus, if the deceased dies domiciled in England and his English administrator obtains a grant in Victoria and there recovers debts due to the deceased, the amount recovered comes into his hands as Victorian administrator; he must administer it according to the law of Victoria,<sup>4</sup> and the only portion which passes to him under the English grant is that part (if any) which under Victorian law comes to or remains in his hands for administration in England, *i.e.*, which he holds in his character of English administrator.

(3) Any goods of the deceased, *e.g.*, furniture or a watch,

<sup>1</sup> See Rule 75 (1).

<sup>2</sup> See Rule 75 (2).

<sup>3</sup> *Dowdale's Case* (1605), 6 Rep. 46 b, *nom. Richardson v. Dowdale*, Cro. Jac. 55; *Atkins v. Smith* (1740), 2 Atk. 63. Compare, as to the general effect of an English grant, *Stirling-Maxwell v. Cartwright* (1879), 11 Ch. D. (C. A.) 522; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; and consider especially, Westlake, pp 123, 124 compared with Story, s. 514 a.

<sup>4</sup> See chap. xxx., Rule 181, p. 658, *post*.

which are brought into England after his death, before any person has, under the law of a foreign country where they are situated, obtained a good title to them, pass to the English administrator; and goods which belong to the deceased, but which after his death have in a foreign country, in accordance with the laws thereof, passed to and come into the possession of another person, *e.g.*, a purchaser, certainly do not on coming to England become the property of the English administrator. The question requiring consideration is whether goods of the deceased to which another person has in a foreign country obtained a title, *e.g.*, as foreign personal representative, without having taken them into possession, pass, on arriving in England, to the English administrator?<sup>1</sup>

(4) In cases in which a foreign personal representative can be made accountable in England for property of deceased in his hands in England,<sup>2</sup> such property is recoverable in England by, and constitutes assets in the hands of, the English administrator.<sup>3</sup>

### Illustrations.

In the following illustrations *N* is the deceased, *A* is the English administrator.

1. *N* leaves freehold and leasehold property, and goods and bills payable to bearer, in England. They pass to *A*.

2. *N* leaves debts due to him from debtors resident in England. They pass to *A*.

3. *N* dies in a lodging at New York and leaves goods there. At *A*'s request the landlord of the house where *N* dies hands over the goods to *A* as *N*'s English administrator, and also pays *A* as such administrator 100% due from the landlord to *N*. No representative of *N* has been constituted under the law of New York. *A* comes to England with the goods and money. The goods and the money pass to *A*.

4. *A* recovers by action in England 100% due to *N* from *X*, a debtor living in New York. The 100% passes to *A*.

5. *N* dies leaving goods in New York. *B* takes out administration to *N* in New York, and, as New York administrator, takes

<sup>1</sup> Compare Westlake, p. 119, and see further on this point chap. xviii., comment on Rule 120, p. 448, *post*.

<sup>2</sup> See chap. xviii., Rule 121, *post*.

<sup>3</sup> See Westlake, pp. 122, 123; *Lowe v. Fairlie* (1817), 2 Madd. 101; *Logan v. Fairlie* (1825), 2 S. & St. 284; *Sandilands v. Innes* (1829), 3 Sim. 263; *Tyler v. Bell* (1837), 2 My. & Cr. 89; *Bond v. Graham* (1842), 1 Hare, 482.

possession of the goods. *B* at New York sells them to a purchaser who brings them to England. They do not pass to *A*.

6. *N* dies in New York leaving there a watch and jewels. *B* takes out letters of administration in New York to *N*. After *B* has taken out letters of administration to *N*, but before *B* has taken possession of the watch and jewels, *X*, the son of *N*, takes possession of them, and brings them to England. *Semble*, they pass to *A*?<sup>1</sup>

7. *N*, domiciled in England, dies intestate in New York, where he leaves goods. *B* obtains letters of administration to *N* from a Court of competent jurisdiction in New York. *B*, acting under the direction of such Court, hands over the goods of *N* at New York to *C*, as the person entitled to them in the judgment of such Court as *N*'s next of kin. *C* brings the goods to England. Whether the goods pass to *A*?<sup>2</sup>

*Extension of English Grant to Ireland and Scotland.*

RULE 76.<sup>3</sup>—An English grant<sup>4</sup> will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in Ireland, be sealed with the seal of the said Court, and be of the like force and effect, and have the same operation in

<sup>1</sup> See Westlake, p. 119, and Foote (3rd ed.), p. 290. "If property came to England after the death, would the foreign administration give a right to it?" *Whyte v. Rose* (1842), 3 Q. B. 493, 506, per Rolfe, B. "Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?" *Ibid.*, per Parke, B.

It may, however, be doubtful whether the goods have not become the goods of *B* before their arrival in England, and therefore whether they ought to pass to *A*.

<sup>2</sup> See Walker & Elgood, pp. 226, 234.

<sup>3</sup> "From and after the [1st day of January, 1858], when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to, and a copy thereof deposited with, the Registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and, being duly stamped, shall be of the like force and effect, and have the same operation in Ireland, as if it had been originally granted by the Court of Probate in Ireland." Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 94.

See, further, the Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57). Compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

<sup>4</sup> For meaning of "English grant," see Rule 62, p. 303, *ante*.



Ireland, as a grant of probate or letters of administration made by the said Court.<sup>1</sup>

The latter grant is hereinafter referred to as an Irish grant.

#### Comment.

An English grant may be extended to Ireland under this Rule, whatever be the domicile of the deceased.<sup>2</sup>

RULE 77.<sup>3</sup>—An English grant made to the administrator of any person duly stated to have died domiciled ' in England will, on production of the said grant to, and deposition of a copy thereof with, the clerk of the Sheriff Court of the County of Edinburgh, be duly indorsed with the proper certificate by the said clerk, and thereupon have the same operation in Scotland as if a confirmation had been granted by the said Court.

#### Comment.

In accordance with this Rule, an English grant may, when the deceased dies domiciled in England, by formal proceedings, be extended to Scotland, so as to have there the operation of a "con-

<sup>1</sup> But note that the Land Transfer Act, 1897, does not extend to Ireland or to Scotland, or indeed to any other foreign country, *i.e.*, to any country except England. Compare s. 26 and the Land Transfer Act, 1875, s. 2.

<sup>2</sup> Contrast Rule 76 as to the extension of an English grant to Scotland.

<sup>3</sup> "From and after the date aforesaid [12th Nov. 1858], when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or, by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the County of Edinburgh, and a copy thereof deposited with the Commissary Clerk of the said Court, the Commissary Clerk shall indorse or write on the back or face of such grant a certificate in the form, as near as may be, of the Schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland, as if a confirmation had been granted by the said Court." Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56), s. 14.

See, further, the Judicature Act, 1873 (36 & 37 Vict. c. 66), and the Sheriff Court (Scotland) Act, 1876 (39 & 40 Vict. c. 70), ss. 35, 41, and compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

<sup>4</sup> Contrast Rule 76, p. 350, *ante*, as to extension of English grant to Ireland.

firmation," which is the equivalent, under Scotch law, to a grant of probate or letters of administration.

The general effect of the Confirmation and Probate Act, 1858, on the fourteenth section of which<sup>1</sup> our Rule is grounded, has been thus stated :—

" The statute of 1858 was passed for the double object of  
 " simplifying the procedure necessary, in Scotland for confirma-  
 " tion, and in all parts of the United Kingdom for what it may be  
 " convenient to call ancillary administrations ; and of enabling, in  
 " the latter class of cases, a single stamp, denoting the duty pay-  
 " able on the aggregate value of the whole personal estate within  
 " the United Kingdom, to be placed upon the principal grant,  
 " whether of probate or administration in England or Ireland, or  
 " of confirmation in Scotland ; the latter object being purely fiscal.  
 " For the purposes of that Act, *and for those purposes only* (as is  
 " expressly provided by section 17), a statement of the domicile  
 " of the deceased person in Scotland, or in England or Ireland, on  
 " the face of any interlocutor of the Commissary Judge granting  
 " confirmation, or of any probate or letters of administration  
 " granted in England or Ireland, is made conclusive evidence, that  
 " is, it is to determine conclusively which shall be deemed the  
 " principal grant, on which the duty on the whole personal assets  
 " within the United Kingdom is to be paid, and which is to be  
 " followed, in the rest of the United Kingdom, by the procedure  
 " substituted by the Act for that previously in use. The substi-  
 " tuted procedure is the sealing or indorsement of the instrument  
 " bearing the stamp on which the duty has been paid, by the  
 " proper Court, in each of the other parts of the United Kingdom.  
 " It is clear, that if, in any case, the domicile should happen to be  
 " erroneously stated on the face of the instrument so sealed or  
 " indorsed, all parties interested may assert their rights, and pursue  
 " their remedies, in any forum which would have been competent  
 " if that Act had never been made ; nor is there anything to alter  
 " or take away any such rights or remedies when the domicile is  
 " correctly stated."<sup>2</sup>

RULE 78.<sup>3</sup>—Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession,

<sup>1</sup> As modified by subsequent enactments.

<sup>2</sup> *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 512, language of Lord Selborne.

<sup>3</sup> 55 Vict. c. 6, s. 1, and Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18, sub-s. 2.

*i.e.*, to any part of the British dominions not forming part of the United Kingdom, adequate provision is made for the recognition in that possession of an English grant.

#### Comment.

“ Her Majesty the Queen may, on being satisfied that the  
“ legislature of any British possession [*i.e.*, any part of the British  
“ dominions<sup>1</sup> exclusive of the United Kingdom<sup>2</sup>] has made  
“ adequate provision for the recognition in that possession of  
“ probates and letters of administration [which terms include con-  
“ firmation in Scotland] granted by the Courts of the United  
“ Kingdom, direct by Order in Council that this Act [*i.e.*, the  
“ Colonial Probates Act, 1892] shall, subject to any exceptions  
“ and modifications specified in the Order, apply to that possession,  
“ and thereupon, while the Order is in force, this Act shall apply  
“ accordingly.”<sup>3</sup>

The effect of this enactment is that, whenever the Colonial Probates Act, 1892, which provides means for the recognition in the United Kingdom of probates and letters of administration granted in British possessions,<sup>4</sup> has been applied to a British possession, steps must also have been taken by the legislature of such British possession for the recognition there of probates and letters of administration granted by the Courts of the United Kingdom.

<sup>1</sup> For meaning of “ British dominions,” see definitions, p. 68, *ante*.

<sup>2</sup> “ The expression ‘ British possession ’ shall mean any part of Her Majesty’s dominions, exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.” Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18, sub-s. 2.

<sup>3</sup> Colonial Probates Act, 1892 (55 Vict. c. 6), s. 1, with which read s. 6.

<sup>4</sup> See as to extension of colonial grant to England, chap. xviii., Rule 124, p. 454, *post*.

PART II.<sup>1</sup>

JURISDICTION OF FOREIGN COURTS.

CHAPTER XII.

GENERAL RULES AS TO JURISDICTION.

RULE 79.—In this Digest

- (1) "Proper Court" means a Court which is authorised by the sovereign, under whose authority such Court acts, to adjudicate upon a given matter.
- (2) "Court of competent jurisdiction" means a Court acting under the authority of a sovereign of a country who, as the sovereign of such country, has, according to the principles maintained by English Courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the Courts of a foreign country "have jurisdiction," it is meant that they are Courts of competent jurisdiction;
  - (ii) it is stated that the Courts of a foreign country "have no jurisdiction," it is meant that they are not Courts of competent jurisdiction.
- (3) "Foreign<sup>2</sup> judgment" means a judgment, decree, or order of the nature of a judgment

<sup>1</sup> See as to the aim of the Rules in Part II., pp. 192—194, *ante*.

<sup>2</sup> For the meaning of the word "foreign," see pp. 67, 71, *ante*.

(by whatever name it be called), which is pronounced or given by a foreign Court.<sup>1</sup>

Comment.

(1) "*Proper Court*" and (2) "*Court of competent jurisdiction*."<sup>2</sup>

(1) The term "proper Court" has reference to the intra-territorial competence of a Court, and means a Court authorized by the law of the country to which the Court belongs, or, in strictness, by the sovereign under whose authority the Court acts, to adjudicate about a given matter. Thus, the Pennsylvanian Court of Common Pleas<sup>3</sup> is a "proper Court" for the purpose of divorcing persons resident, though not domiciled, in Pennsylvania, since the Court has under the law of Pennsylvania jurisdiction to divorce such persons. A proper Court is often designated, by English writers, a "Court of competent jurisdiction," but this is not the sense in which the expression "Court of competent jurisdiction" is used in this Digest.

(2) The term "Court of competent jurisdiction" refers, not to the intra-territorial, but to the extra-territorial<sup>4</sup> competence of a Court, or rather to the extent to which the competence of a Court is admitted in any country other than the country to which the Court belongs. When thus used, as it constantly is by English writers, the term means a Court acting under the authority of the sovereign of a country, who, as sovereign thereof, may rightly, according to the principles maintained by English law, determine or adjudicate upon a given matter. To put the same thing in other words, the term "Court of competent jurisdiction" means a Court belonging to a country the Courts whereof may rightly, according to the principles maintained by English Courts, determine or adjudicate upon a given matter. Thus, the Courts of a country where married persons, whether British subjects or not, are domiciled are Courts of competent jurisdiction to divorce

<sup>1</sup> This definition or description is suggested by Piggott (2nd ed.), p. 2; but it is not meant to include, as does his definition, an adjudication of bankruptcy or a grant of administration. He, moreover, confines his definition to a judgment pronounced by a Court of competent jurisdiction, which I have purposely not done.

<sup>2</sup> See Intro., p. 89, note 3, *ante*. Compare *Turnbull v. Walker* (1892), 5 R. 132, 134, judgment of Wright, J.

<sup>3</sup> See *Green v. Green*, [1893] P. 89.

<sup>4</sup> This distinction is drawn in somewhat different language by Westlake. See Westlake (3rd ed.), pp. 347—349; and compare 4th ed., pp. 370, 371; and 2 Bishop, *Marriage and Divorce*, sects. 4—13.

such persons, since, according to the principles maintained by English tribunals, the Courts of the country where persons are domiciled, or rather the sovereign of such country acting through his Courts, may rightly divorce such persons.<sup>1</sup> This is the sense in which the term "Court of competent jurisdiction" is used in this Digest.

The words in Rule 79, "as the sovereign of such country," are added to meet the case of countries, such as Scotland or Ireland, which are separate "countries" though forming part of one "State."<sup>2</sup> When our judges decide that the Court of Session is not a Court of competent jurisdiction for the divorce of persons domiciled in England, they of course do not decide that the sovereign of the United Kingdom has not a right to divorce such persons. What they do decide is that, according to the principles of English law, the sovereign of the United Kingdom has not, in the character of sovereign of Scotland and acting through the Scotch Courts, authority to grant a divorce to persons domiciled in England.<sup>3</sup>

#### (A) WHERE JURISDICTION DOES NOT EXIST.

##### (i) *In Respect of Persons.*

RULE 80.—The Courts of a foreign country have no jurisdiction over, *i.e.*, are not Courts of competent jurisdiction as against—

- (1) any sovereign,
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country.<sup>4</sup>

<sup>1</sup> *Harvey v. Farnie* (1882), 8 App. Cas. 43. Compare chap. vii., Rule 48, p. 256, *ante*, and chap. xv., Rule 86, p. 381, *post*, and Intro., pp. 40—44, *ante*.

<sup>2</sup> As to the meaning of these terms, see pp. 69—71, *ante*.

<sup>3</sup> A judgment, be it noted, given by a foreign Court of undoubtedly competent jurisdiction, may yet not be enforceable or have effect in England (see chap. xvii., Rules 93—95, *post*); and, on the other hand, a judgment given by a foreign Court, which is not a proper Court, but is a Court of competent jurisdiction, may (*semble*) be enforceable or have effect in England. See Rule 92, p. 393, *post*, and *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341; 33 L. J. C. P. 78.

The question, further, when it comes before English judges, whether a foreign (*e.g.*, a French) Court is a Court of competent jurisdiction, is in reality always the question whether the French Courts are Courts of competent jurisdiction.

<sup>4</sup> See Hall, *International Law* (5th ed.), pp. 169—185.

## Comment.

(1) *As to a sovereign*.—"A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary . . . tribunals."<sup>1</sup> This principle, which is rigidly maintained by English Courts as regards their own jurisdiction,<sup>2</sup> would doubtless be maintained by them as regards the jurisdiction of a foreign Court over any sovereign.<sup>3</sup>

(2) *As to diplomatic agents*.—"The immunities from civil jurisdiction possessed by a diplomatic agent [according to the rules of international law], though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness."<sup>4</sup>

The question, moreover, how far an English Court would admit the competence of a foreign Court to entertain an action for breach of contract or for tort against a diplomatic agent accredited to the sovereign of the foreign country has never, it is believed, called for decision by any English tribunal, but should the question come before our Courts they would (it is submitted) certainly hold that, except through the consent of such agent, the foreign Court could have no jurisdiction.

(ii) *In Respect of Subject-Matter.*

RULE 81.<sup>5</sup>—The Courts of a foreign country have no jurisdiction—

(1) to adjudicate upon the title, or the right to the

<sup>1</sup> Hall, p. 169.

<sup>2</sup> See Rule 38, p. 195, *ante*.

<sup>3</sup> The right of a foreign (*e.g.*, a French) Court to entertain an action against a sovereign, *e.g.*, the King of Italy, could hardly call for decision in England, since, even were a judgment against such king obtained in France, it is certain that no action could be brought against him on the judgment in England. An English Court might, however, be called upon indirectly to determine whether a foreign Court was competent to entertain proceedings against the property of a foreign sovereign. If a case such as that of *The Constitution* (1879), 4 P. D. 39, or *The Parlement Belge* (1880), 5 P. D. (C. A.) 197, were to come before a French Court, and judgment were given by the French Court against the ship, an English Court might, on the ship coming into an English port, be called upon to determine what, if any, was the effect in England of the French judgment. If such a case should require decision, our Courts would, it is submitted, hold that the French Court was not a Court of competent jurisdiction, and that the judgment had no effect in England. But see Rule 143, p. 519, *post*.

<sup>4</sup> Hall, p. 173.

<sup>5</sup> See Piggott (2nd ed.), p. 139; Story, s. 591.

possession, of any immovable not situate in such country, or

[(2) (*semble*) to give redress for any injury in respect of any immovable not situate in such country (?)].

#### Comment.

*As to clause 1.*—"If the matter in controversy is land, or other immovable property," writes Story, "the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case, for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the *forum rei sitæ* is held absolutely conclusive. '*Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt.*' On the other hand, a judgment in any foreign country, touching such immovables, will be held of no obligation."<sup>1</sup>

The undoubted rule, in short, is that, "if a Court pronounces a judgment affecting land out of its jurisdiction, the Courts of the country where it is situated—and, it is presumed, also the Courts of any other country—are justified in refusing to be bound by it, or to recognise it; and this even if the judgment proceed on the *lex loci rei sitæ*."<sup>2</sup>

This rule is merely an application of the more general principle that no Court ought to give a judgment the enforcement whereof lies beyond the Court's power, and especially if it would bring the Court into conflict with the admitted authority of a foreign sovereign, or, what is the same thing, the jurisdiction of a foreign Court.<sup>3</sup> English Courts, therefore, do not admit the jurisdiction of any foreign Court, *e.g.*, an Irish or a French Court, to determine a person's title, under a will or otherwise, to English immovables,

<sup>1</sup> Story, s. 591.

<sup>2</sup> Piggott (2nd ed.), p. 139.

<sup>3</sup> See Intro., pp. 40—43, *ante*.



in which term must be included leasehold<sup>1</sup> no less than freehold property.

*As to clause 2.*—A question might be raised how far a foreign tribunal would be held by English Courts competent to entertain an action for injuries, *e.g.*, trespass, in respect of land in England. As our Courts do not entertain actions for trespass to foreign land,<sup>2</sup> it is probable that they would deny the competence of a foreign Court to give damages for trespass to land in England, or for trespass to land in any foreign country to which the Court did not belong.

### Illustrations.

1. *T*, by his will duly executed in 1842, devised all his real and personal estate to *A*. He had real estate in Ireland and also in England. The Irish Courts, it was held, had no jurisdiction to adjudicate upon the validity of the will as relates to the real estate in England; and a decree of the Irish Court of Chancery in 1852, after verdict upon an issue *devisavit vel non*, did not determine the validity or invalidity of the will so far as it related to lands in England, and could not be pleaded in bar to a suit in the English Court of Chancery.<sup>3</sup>

2. *T*, domiciled in Ireland, leaves a will devising the whole of his real and personal estate to *A*. *T* dies possessed of lands both in Ireland and in England. The Probate Division of the Irish High Court has no jurisdiction to grant probate or make a decree under 20 & 21 Vict. c. 79, ss. 65—67, so as directly<sup>4</sup> to affect the rights of persons interested in the land in England (?).

<sup>1</sup> Compare *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123.

<sup>2</sup> *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602. See Rule 39, p. 201, *ante*.

<sup>3</sup> *Boyse v. Colclough* (1854), 1 K. & J. 124.

<sup>4</sup> Whether, owing to the effect of 20 & 21 Vict. c. 79, s. 95 (Rule 122, *post*), taken together with the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 1, which vests English land in the personal representative of the deceased, an Irish grant, sealed and extended to England, may by possibility affect indirectly the title to English land, whether personal or real estate (?). A similar question applies to a Scotch confirmation extended to England under 21 & 22 Vict. c. 26, s. 12 (Rule 123, *post*), and to a Colonial grant, sealed and extended to England under 55 Vict. c. 6, s. 2, sub-ss. 1, 2 (Rule 124, *post*).

## (B) WHERE JURISDICTION DOES EXIST.

RULE 82.—Subject to Rules 80 and 81, the Courts of a foreign country have jurisdiction (*i.e.*, are Courts of competent jurisdiction)—

(1) in an action or proceeding<sup>1</sup> *in personam* ;<sup>2</sup>

(2) in an action or proceeding *in rem* ;<sup>3</sup>

(3) in matters of divorce, or having reference to the validity of a marriage ;<sup>4</sup>

(4) in matters of administration and succession,<sup>5</sup> to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction.

<sup>1</sup> “ Or proceeding ” is added to cover any proceeding of the nature of an action.

<sup>2</sup> See chap. xiii., Rules 83, 84, *post*.

<sup>3</sup> See chap. xiv., Rule 85, *post*.

<sup>4</sup> See chap. xv., Rules 86—88, *post*.

<sup>5</sup> See chap. xvi., Rules 89, 90, *post*.

## CHAPTER XIII.

JURISDICTION IN ACTIONS *IN PERSONAM*.<sup>1</sup>

RULE 83.—In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases:—

*Case 1.*—Where at the time of the commencement of the action the defendant was resident [or present ?<sup>2</sup>] in such country, so as to have the benefit, and be under the protection, of the laws thereof.<sup>3</sup>

*Case 2.*—Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.<sup>4</sup>

*Case 3.*—Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, *i.e.*, has precluded himself from objecting thereto<sup>5</sup>—

(a) by appearing as plaintiff<sup>6</sup> in the action,  
or

(b) by voluntarily appearing as defendant<sup>7</sup>  
in such action without protest, or

<sup>1</sup> Story, ss. 538—543, 546—549; Westlake (4th ed.), pp. 371—376; Foote (3rd ed.), pp. 550—555; Nelson, pp. 352—365. See Intro., General Principle No. III., p. 40; and pp. 47—51, *ante*.

<sup>2</sup> *Carrick v. Hancock* (1895), 12 T. L. R. 59.

<sup>3</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371. Compare *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Sardar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670.

<sup>4</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Douglas v. Forrest* (1828), 4 Bing. 686.

<sup>5</sup> See Nelson, pp. 361, 363; Westlake (4th ed.), pp. 375—379; Foote (3rd ed.), pp. 552—555.

<sup>6</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161.

<sup>7</sup> *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39, 42; *Molony v. Gibbons* (1810), 2 Camp. 502.

(c) by having expressly or implicitly contracted<sup>1</sup> to submit to the jurisdiction of such Courts.

### Comment and Illustrations.

#### *General Observations.*

*First.* The authority of the English Courts to entertain proceedings *in personam* against a defendant has, until quite modern times, been based in substance solely on the presence in England of the defendant at the commencement of the proceedings.<sup>2</sup> No question, therefore, has until recently arisen as to how far the jurisdiction *in personam* of our tribunals might or might not be affected by circumstances other than the defendant's presence in England, as, for example, by his place of residence or domicile, by his nationality or allegiance, by the place where a cause of action arose, or by the defendant's possession of property in England. These matters being irrelevant as regarded the jurisdiction exercisable by English judges, our Courts have never till recently been called upon to form for their own use a general theory as to jurisdiction. Hence, when they have been compelled to consider the effect which ought to be given to foreign judgments, they have shown an inclination to elude the necessity for formulating any general doctrine as to the principles which ought to regulate the exercise of jurisdiction by foreign Courts,<sup>3</sup> and have, where it was

<sup>1</sup> *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17; *Vallée v. Dumergue* (1849), 4 Ex. 290; 18 L. J. Ex. 398; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Meeus v. Thellusson* (1853), 8 Ex. 638; 22 L. J. Ex. 239; *Kelsall v. Marshall* (1856), 1 C. B. (N. S.) 241; 26 L. J. C. P. 19. Conf. *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302.

<sup>2</sup> The jurisdiction of the Superior Courts of Common Law and of Equity depended substantially upon the king's writ being served upon the defendant. A writ could always be served on any defendant who was in England; and if some special cases be set aside in which the Court of Chancery allowed a writ of subpoena out of England, a writ could not be served on any defendant who was out of England. Hence the presence of a defendant in England was in effect the basis of the jurisdiction exercisable by our Courts. See, as to Chancery procedure generally, 1 Spence (1st ed.), p. 367; and as to service of a writ of subpoena out of England, 2 Spence, p. 7, note (a), and General Orders of May 8, 1845, rule 32. It has only been of quite recent times that under statutory authority the service of a writ of summons out of England has been allowed, and the jurisdiction of the English Courts in actions *in personam* been extended to defendants who are out of England. See pp. 222—249, *ante*.

<sup>3</sup> See Westlake (4th ed.), p. 371; Story, ss. 610, 531, 537—540, 546—549.

possible, tried to determine each case more or less in reference to its special circumstances.

*Secondly.* In the vast majority of the reported cases which have reference to the jurisdiction of foreign Courts, the matter calling for determination has been how far a judgment given against a defendant in proceedings abroad can be enforced against him in England by means of an action. The question, therefore, raised, in so far as it really referred to the competence of the foreign tribunal, has been whether it was or was not the "duty"<sup>1</sup> of the defendant to obey the judgment of the foreign Court, or (what is the same thing) the command of the sovereign under whose authority the Court acted; and the answer to this inquiry has been judicially given in the form of a more or less complete enumeration of the cases in which a party to an action abroad is bound to obey the judgment of the foreign Court, or the commands of the foreign sovereign. It will be observed that the judgments or judicial *dicta* on this subject which are here cited mainly refer to the case of a defendant; but in principle they are clearly applicable to any person against whom a Court pronounces judgment in an action *in personam*. There is, however, little need to particularise the various circumstances, such, for example, as residence or allegiance, which might conceivably make it the duty of a plaintiff to obey the judgment of the foreign Court; for by the mere bringing of the action he has submitted himself to the jurisdiction of the Court, and in fairness to the defendant, if for no other reason, is bound to submit to the judgment of the tribunal to which he has himself appealed.

If the attitude of English judges with regard to questions of jurisdiction be borne in mind, the principles, which in their view ought, as regards actions *in personam*, to determine whether the Courts of a foreign country are in a given case Courts of competent jurisdiction, may be gathered from the following statements taken from well-known judgments.

"The true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smyth*,<sup>2</sup> and again repeated by him in *Williams v. Jones*,<sup>3</sup> that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay

<sup>1</sup> See Intro., p. 50, *ante*.

<sup>2</sup> 9 M. & W. at p. 819.

<sup>3</sup> 13 M. & W. at p. 633.

“the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.”<sup>1</sup>

“We think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. . . .<sup>2</sup> But [each of these] suppositions is negatived in the present case.

“Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.”<sup>3</sup>

This doctrine is slightly expanded in a later judgment delivered by Fry, L. J.

“Then arises the question how far the defendant is bound by [the foreign judgment], and the law upon this point, I think, I may conveniently take from the case of *Schibsby v. Westenholz*,<sup>4</sup> which has been so much discussed in the course of the argument. In that case the Court considered the principles on which foreign judgments are enforced by Courts of this country, and they said:<sup>5</sup> ‘We think, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smyth*,<sup>6</sup> and again repeated by him in *Williams v. Jones*,<sup>7</sup> that the judgment of a Court of competent jurisdiction over the defendant imposes a

<sup>1</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 159.

<sup>2</sup> The words omitted contain the suggestion that the presence of the defendant in a foreign country at the time when the obligation in respect of which the action is brought was there contracted may give the Courts thereof jurisdiction. But see *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; and Rule 84, p. 374, *post*.

<sup>3</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161, per Blackburn, J.; *Turnbull v. Walker* (1892), 5 R. 132.

<sup>4</sup> L. R. 6 Q. B. 155.

<sup>5</sup> *Ibid.* 159.

<sup>6</sup> 9 M. & W. 810, 819.

<sup>7</sup> 13 M. & W. 628, 633.

“ ‘duty or obligation on the defendant to pay the sum for which  
 “ ‘judgment is given, which the Courts in this country are bound  
 “ ‘to enforce ; and consequently that anything which negatives that  
 “ ‘duty, or forms a legal excuse for not performing it, is a defence  
 “ ‘to the action.’ What are the circumstances which have been held  
 “ to impose upon the defendant the duty of obeying the decision of  
 “ a foreign Court? Having regard to that case, and to *Copin v.*  
 “ *Adamson*,<sup>1</sup> they may, I think, be stated thus. The Courts of this  
 “ country consider the defendant bound where he is a subject of  
 “ the foreign country in which the judgment has been obtained ;  
 “ where he was resident in the foreign country when the action  
 “ began ; where the defendant in the character of plaintiff has  
 “ selected the forum in which he is afterwards sued ; where he has  
 “ voluntarily appeared ; where he has contracted to submit himself  
 “ to the forum in which the judgment was obtained, and possibly,  
 “ if *Becquet v. MacCarthy*<sup>2</sup> be right, where the defendant has real  
 “ estate within the foreign jurisdiction, in respect of which the  
 “ cause of action arose whilst he was within that jurisdiction.”<sup>3</sup>

“ All jurisdiction is properly territorial, and ‘*extra territorium  
 “ jus dicenti, impune non paretur.*’ Territorial jurisdiction attaches  
 “ (with special exceptions) upon all persons either permanently or  
 “ temporarily resident within the territory while they are within  
 “ it ; but it does not follow them after they have withdrawn from  
 “ it, and when they are living in another independent country. It  
 “ exists always as to land within the territory, and it may be  
 “ exercised over movables within the territory ; and, in questions of  
 “ status or succession governed by domicile, it may exist as to per-  
 “ sons domiciled, or who when living were domiciled, within the  
 “ territory. As between different provinces under one sovereignty  
 “ (e.g., under the Roman Empire) the legislation of the sovereign  
 “ may distribute and regulate jurisdiction ; but no territorial  
 “ legislation can give jurisdiction which any foreign Court ought

<sup>1</sup> L. R. 9 Ex. 345.

<sup>2</sup> 2 B. & Ad. 951. But whether this case has reference to the possession of real property by the defendant as a ground of jurisdiction? This query has received judicial approval. See *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302, 310. judgment of Buckley, L. J. In other words, *Becquet v. MacCarthy* cannot now be treated as an authority for the doctrine that where a defendant has immovable property in a foreign country in respect of which the cause of action has arisen, the Courts thereof have jurisdiction over him.

<sup>3</sup> *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 370, 371, per Fry, J.; *Feyerick v. Hubbard* (1902), 71 L. J. K. B. 509.

“to recognise against foreigners, who owe no allegiance or obedience to the power which so legislates.

“In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation, except (when authorised by special local legislation) in the country of the forum by which it was pronounced.”<sup>1</sup>

### *Particular Cases.*

The circumstances under which, according to the judgments in *Schibsby v. Westenholz*,<sup>2</sup> and *Rousillon v. Rousillon*,<sup>3</sup> taken together with the judgment of the Privy Council in *Sirdar Gurdial Singh v. Rajah of Faridkote*,<sup>4</sup> a person is bound to obey the judgment of a foreign Court, correspond with, or are in fact restated in, the three cases in which, under Rule 83, the Courts of a foreign country have jurisdiction.

These three cases are applications of two principles explained and discussed in the Introduction to this work.<sup>5</sup> Cases 1 and 2 are clearly covered by the “principle of effectiveness.” Case 3 is with equal clearness covered by the “principle of submission.”

The list given in this Rule of the cases in which foreign Courts are, or may be, Courts of competent jurisdiction is not necessarily exhaustive. The law on the authority to be ascribed to the decisions of foreign tribunals is still uncertain, and still liable to undergo further development by means of judicial legislation. It is impossible, therefore, to assert with confidence that the jurisdiction of foreign Courts is in the opinion of English judges absolutely confined to the cases enumerated in Rule 83.

*Case 1. Residence.*—The *residence*<sup>6</sup> of a defendant in a country at the time when an action is commenced against him is an admitted ground of jurisdiction. “If the defendants had been,”

<sup>1</sup> *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 683, 684, judgment of P. C.

<sup>2</sup> (1870) L. R. 6 Q. B. 155. See pp. 363, 364, *ante*.

<sup>3</sup> (1880) 14 Ch. D. 351.

<sup>4</sup> [1894] A. C. 670.

<sup>5</sup> Viz.: General Principle No. III., Intro., p. 40, *ante*, and General Principle No. IV., Intro., p. 41, *ante*.

<sup>6</sup> See Rule 83, Case 1, p. 361, *ante*.



it is said by the Court in *Schibsby v. Westenholz*, "at the time  
 "when the suit was commenced resident in the country, so as to  
 "have the benefit of its laws protecting them, or, as it is some-  
 "times expressed, owing temporary allegiance to that country, we  
 "think that its laws would have bound them."<sup>1</sup>

As the *presence* of a defendant in England at the time of the service of the writ was the sole foundation of the jurisdiction of the English Courts, they could hardly decline to hold that the *residence* of a defendant in a foreign country gave jurisdiction to the Courts thereof.

Two questions may, however, be raised on this point.

*First Question.*—Is *residence*, in the strict sense of the term, necessary, or will the mere presence of the defendant in the foreign country, *e.g.*, France, be enough to give the French Courts jurisdiction? The answer is that his *presence* is enough, or in other words, that residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ, or other process by which the action is commenced.<sup>2</sup>

The Lord Chief Justice (Lord Russell of Killowen) observed, "that the jurisdiction of a Court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws, and to the lawful jurisdiction of its Courts. In his opinion, that duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time [during which] the person was actually in the territory was wholly immaterial."<sup>3</sup>

1. *X* is an Englishman living in France at the time when an action is commenced there against him. The French Courts have jurisdiction over *X*.<sup>4</sup>

2. *X* is an English traveller, staying for a few days at an hotel in Massachusetts. Whilst he is there a writ is issued and served upon him requiring him to appear as defendant in an action

<sup>1</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161, *per curiam*. See Piggott, pp. 130, 131.

<sup>2</sup> *Carriek v. Hancock* (1895), 12 T. L. R. 59.

<sup>3</sup> *Ibid.*, 59, 60.

<sup>4</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155. As to how far want of notice may be an answer to an action on a judgment, see Rule 95, p. 403, *post*.

brought against him in a Massachusetts Court. The Massachusetts Court has jurisdiction.

3. The circumstances are the same as in Illustration 2, except that the writ is issued a day or two before *X* arrives in Massachusetts. The Massachusetts Court has (*semble*) jurisdiction.<sup>1</sup>

4. The circumstances are the same as in Illustration 2, except that though the writ is *issued* whilst *X* is in Massachusetts, it is not *served* upon him there. The Massachusetts Court has (*semble*) jurisdiction.<sup>2</sup>

*Second Question.*—Is the *domicil* of the defendant, as contrasted with and in the absence of residence, sufficient to give a foreign Court jurisdiction? This question must (it is submitted) be answered in the negative.<sup>3</sup>

*X* is a British subject residing in England, but domiciled in France. An action is brought against him in Paris. He is served with process or notice of process in England. The French Court has (*semble*) no jurisdiction.

*Case 2. Allegiance.*—"The Courts of this country consider the "defendant bound where he is a *subject*<sup>4</sup> of the foreign country "in which the judgment [against him] has been obtained."<sup>5</sup> Allegiance, that is to say, is, independent of residence, a ground of jurisdiction. The reason of this is that a subject is bound to obey the commands of his sovereign, and, therefore, the judgments

<sup>1</sup> See, in favour of jurisdiction, *i.e.*, in favour of the Massachusetts Court being held in England a Court of competent jurisdiction, *Carrick v. Hancock* (1895), 12 T. L. R. 59; *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670. But on the other hand, note that if the issue of the writ is to be taken to be the commencement of the action, *X* is not in Massachusetts at the time when the action commences, and therefore does not come precisely within any of the cases cited. In *Carrick v. Hancock* it does not appear at what point the action commenced.

<sup>2</sup> See *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670. But though the Court would be technically a Court of competent jurisdiction on the ground of *X* being in Massachusetts at the moment when the action commenced, still, unless he were served when out of Massachusetts, *e.g.*, in England, with due notice of the writ having been issued, a judgment by the Massachusetts Court might be invalid in England (see Rule 95, *post*) on account of the proceedings being opposed to natural justice.

<sup>3</sup> Note that English Courts do now, though this is a novelty, claim for themselves in some instances jurisdiction over a defendant in an action *in personam* simply on the ground of his domicile or ordinary residence in England. See Intro., pp 43, 44, 49, 52–54, *ante*; and R. S. C. Ord. XI. r. 1 (g).

<sup>4</sup> See Rule 83, Case 2, p. 361, *ante*.

<sup>5</sup> *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371, judgment of Fry, J. See *Douglas v. Forrest* (1828), 4 Bing. 686.

of his sovereign's Courts. The allegiance must, it would seem, exist at the time not when the action is commenced, but when the judgment is given.<sup>1</sup> And a nice question of jurisdiction might arise, supposing a defendant to have changed his allegiance after the commencement of an action against him.

The doctrine, however, that allegiance is sufficient to give jurisdiction, though supported by judicial *dicta*, cannot be established by any reported decision. In *Douglas v. Forrest*,<sup>2</sup> which goes near to a decision on this point, the Court dwell on the fact of the defendant having at the time of the judgment possessed property in Scotland.

1. *X* is a French citizen residing and domiciled in England. An action is brought against *X* in France. *X*, whilst residing in England, has actual notice of the action. Judgment is, in his absence, pronounced against *X* in France. The French Court (*semble*) has jurisdiction.<sup>3</sup>

\*2. *X* is a French citizen residing and domiciled in England. An action is brought against *X* in France, and judgment is pronounced against *X* in the French Court. *X* has not been served with any process, and has not any actual notice of the action, but steps are taken in France which under French law are equivalent to service of process. The French Court has (*semble*) jurisdiction.<sup>4</sup>

*Case 3. Submission.*—This case rests on the simple and universally admitted principle that a litigant who has *voluntarily submitted*<sup>5</sup> himself to the jurisdiction of a Court cannot afterwards dispute its jurisdiction.<sup>6</sup> The submission may take place in different ways, and may be made either by the party who is plaintiff or by the party who is defendant before the foreign Court.

(a) *Plaintiff.*—"We think it clear, upon principle, that if a "person selected, as plaintiff, the tribunal of a foreign country "as the one in which he would sue, he could not afterwards say "that the judgment of that tribunal was not binding upon him."<sup>7</sup>

<sup>1</sup> Compare *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371; *Meek v. Wendt* (1888), 21 Q. B. D. 126, 130.

<sup>2</sup> (1828) 4 Bing. 686.

<sup>3</sup> Compare *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161, and *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17; (1874) L. R. 9 Ex. 345.

<sup>4</sup> See *Douglas v. Forrest* (1828), 4 Bing. 686; *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17; and contrast *Buchanan v. Rucker* (1808), 1 Camp. 63.

<sup>5</sup> See Rule 83, Case 3, p. 361, *ante*.

<sup>6</sup> See Intro., p. 44, *ante*.

<sup>7</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161. See Westlake (4th ed.), pp. 375, 376.

*A*, an Englishman residing in England, brings an action against *X* in France for the breach of a contract made and broken in England. The French Court gives judgment in *X*'s favour. The French Court has jurisdiction over *A*.<sup>1</sup>

(b) *Defendant*.—A person who voluntarily appears as defendant in an action submits himself to the judgment of the Court, so that he cannot afterwards dispute its jurisdiction.<sup>2</sup> When, therefore, a defendant appears without protest, he does certainly *primâ facie* submit himself to the Court's jurisdiction. A defendant, on the other hand, who appears only to protest against the jurisdiction of the Court, certainly does not submit himself to its jurisdiction.<sup>3</sup>

On this whole matter of submission to a Court's jurisdiction by appearance as defendant, it is well to distinguish three different cases. In each of them *X* is a defendant who appears in a foreign Court, to the jurisdiction of which he would not be subject unless it were for his appearance.

*Case 1*.—*X*, without protesting against the jurisdiction, appears and pleads to the merits. He thereby, *primâ facie* at least, submits to the jurisdiction of the Court.

*Case 2*.—*X* appears and pleads to the jurisdiction, but also pleads to the merits, or at any rate takes part in a defence on the merits. He thereby submits to the jurisdiction of the Court. This, it is submitted, was really the position of things in *Boissiere v. Brockner*.<sup>4</sup>

*Case 3*.—*X* appears and protests against, or pleads to the jurisdiction, but takes no other part in the case. He does not, it is

<sup>1</sup> See *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Novelli v. Rossi* (1831), 2 B. & Ad. 757.

The question as to jurisdiction might arise as against the plaintiff in the foreign action in one of, at least, two ways, viz., (1) on the plea of *res judicata*, if the plaintiff should sue for the same cause of action in England; and (2) on a plea of the party who was plaintiff abroad, if he should be sued on the judgment as defendant in England, *e.g.*, for costs.

<sup>2</sup> *Foinet v. Barrett* (1885), 55 L. J. Q. B. (C. A.) 39.

<sup>3</sup> This statement is not consistent with the language of Cave, J., in *Boissiere v. Brockner* (1889), 6 T. L. R. 85. His Lordship certainly lays down that a defendant who appears merely to protest against, or to plead to, the jurisdiction of a foreign Court submits himself to its jurisdiction; but note that (1) the decision in *Boissiere v. Brockner* may be defended without having recourse to the doctrine laid down by Cave, J., since, in that case, the defendant really pleaded both to the jurisdiction and to the merits; (2) the doctrine of Cave, J., is inconsistent with *Davies v. Preece* (1864), 34 L. J. Q. B. (Ex. Ch.) 8; *Ringland v. Lowndes* (1864), 33 L. J. C. P. 337, which have always been held to be well decided.

<sup>4</sup> (1889) 6 T. L. R. 85.

conceived, submit himself to the jurisdiction of the Court, and a judgment given by the foreign Court would be held by English Courts to be a judgment given by a Court which has no jurisdiction.

When, however, a defendant has appeared and submitted to the jurisdiction of the Court, a question may arise whether the appearance is voluntary, and in this matter the following distinction must be noted:—

If a defendant appears merely to protect his property from the risk of seizure, it has been held that the appearance is “voluntary,”<sup>1</sup> and that the defendant submits to the Court’s jurisdiction; to hold otherwise would, it is said, render the effect of appearance nugatory, for in any action a defendant who has, or may have, property in the country where the action is brought, has reason to fear that the result of the action, if adverse, will be the seizure of his property by execution or otherwise. If, on the other hand, the defendant appears merely to protect property which has already been seized by the foreign Court, it has been held that the appearance is not voluntary, and does not confer jurisdiction upon the Court.<sup>2</sup>

1. *A* brings an action in a French Court against *X*, an Englishman domiciled in England. Notice is served upon *X* in England. *X* appears in France and defends the action. There has been no property of *X*’s at any time in the hands of the Court, but *X* is from his business transactions often in a position in which a judgment of the French Court could be executed against him. The French Court has jurisdiction over *X* on account of his voluntary appearance.<sup>3</sup>

2. The circumstances are the same as in Illustration 1, except that at the time when *X* appears and defends the action he has very valuable property in France which, in case of the judgment

<sup>1</sup> *Voinet v. Barrett* (1885), 55 L. J. Q. B. (C. A.) 39.

<sup>2</sup> *Ibid.*, p. 41, judgment of Esher, M. R.

The distinction suggested rests on good authority but is not entirely satisfactory. “I cannot help thinking,” writes Westlake, “that whenever the House of Lords may have to review the authorities, it will see no difference between property being in the hands of the foreign Court at the date of appearance (carefully considered reservation in *Schibsby v. Westenholz*) and property being at the same date in the foreign country, and therefore within the grasp of its Court.” Westlake (4th ed.), p. 377.

<sup>3</sup> *Voinet v. Barrett* (1885), 55 L. J. Q. B. (C. A.) 39. See *Duflos v. Burlingham* (1880), 34 L. T. 688; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301, 30 L. J. (Ex.) 238; *Malony v. Gibbons* (1810), 2 Camp. 502.

of the Court being against him, might be seized by the French Court. The Court has jurisdiction.

3. *X* is an Englishman resident and domiciled in England. An action is brought against him in France on a contract made, and alleged to have been broken, by him in England. *X* has property in France, which has been seized by the Court. *X*, after the seizure of the property, appears and defends the action with a view to saving his property. *Semble*, *X*'s appearance to the action does not give the French Court jurisdiction.<sup>1</sup>

4. *A* brings an action against *X*, an Englishman domiciled and resident in England, in a Turkish Court. *X* appears and pleads under protest only to the jurisdiction. He does not plead any defence on the merits. Judgment is given against him on the plea to the jurisdiction. He takes no further step and suffers judgment by default or for want of a defence on the merits. Whether *X*'s appearance has given the Turkish Court jurisdiction?

(c) *Contract to submit*.—The parties to a contract may make it one of the express<sup>2</sup> or implied<sup>3</sup> terms of the contract that they will submit in respect of any alleged breach thereof, or any matter having relation thereto, to the jurisdiction of a foreign Court, and a person who has thus contracted is clearly bound by his own submission.<sup>4</sup> All that need be further noted is, that under this head may be brought cases in which, from the nature of the contract, *e.g.*, possibly under peculiar circumstances an agreement with regard to foreign land,<sup>5</sup> it may be presumed that the parties intended to submit to the jurisdiction of particular Courts, viz., the Courts of the country where the land is situate.

1. *A* is a Belgian firm carrying on business in Belgium. *X* is a British subject domiciled in England and resident in London; he enters into a contract to assign certain patent rights to *A* in Belgium. The contract provides (*inter alia*) that "all disputes as to the present agreement and its fulfilment shall be submitted

<sup>1</sup> See *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39, 41, judgment of Esher, M. R., and p. 42, judgment of Bowen, L. J.; but see *Piggott*, p. 161.

<sup>2</sup> *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17; *Law v. Garrett* (1878), 8 Ch. D. (C. A.) 26.

<sup>3</sup> *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 284; 16 Q. B. 717; *Vallée v. Dumergue* (1849), 4 Ex. 290; 18 L. J. Ex. 398.

<sup>4</sup> *Nelson*, p. 363; see *Law v. Garrett* (1878), 8 Ch. D. (C. A.) 26.

<sup>5</sup> But see Rule 84, p. 374, *post*, and compare *British Wagon Co. v. Gray*, [1896] 1 Q. B. (C. A.) 35, decided with reference to Ord. XI. r. 1 (e); and *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302, reversing judgment of Court below, [1907] 1 K. B. 235.

“to the Belgian jurisdiction.” In an action by *A* against *X* brought in the proper Belgian Court for alleged breach of the contract, and in which, in accordance with the provisions of Belgian law, citation is duly served upon *X* in London, judgment is obtained for 1,000%. The Belgian Court has jurisdiction.<sup>1</sup>

2. *X*, an Englishman, enters into a contract with *A* to trade in co-partnership in Russia. *X* resides in England. It is a term of the contract that all disputes, no matter how or where they arise, shall be referred to a Russian Court. Disputes arise concerning the terms of the partnership. *A* brings an action against *X*, in a Russian Court, for alleged breach of the contract. The Russian Court has jurisdiction.<sup>2</sup>

3. *X* is an Englishman, resident and domiciled in England, and not a native or citizen of France. He holds shares in a French company. *X* thereby becomes, under the law of France, subject to all the conditions contained in the statutes of the company. Under these statutes every shareholder is compelled to elect a domicile in France, and, as to all disputes which may arise during the liquidation of the company, is subject to a French tribunal. The company goes into liquidation, and *A* brings an action in France against *X* for the amount not paid up on *X*'s shares. Notice is duly served on *X*, at his elected domicile, though *X* has no knowledge of the statutes of the company or their provisions. *A* recovers judgment against *X*. The French Court has jurisdiction.<sup>3</sup>

4. *X*, an Englishman residing in England, is a member of an Australian company. A colonial Act enables the chairman of the company to sue and be sued for the company, and provides that he is to be taken as agent for the members\* of the company. An action is brought, and judgment recovered, in Australia, against the chairman by *A*; i.e., in effect, an action is brought, and judgment recovered, against *X*; he has no notice of the proceedings against the chairman. The Australian Court has jurisdiction against *X*.<sup>4</sup>

<sup>1</sup> *Feyerick v. Hubbard* (1902), 71 L. J. K. B. 509. This case follows, and, perhaps, slightly extends, *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

<sup>2</sup> See *Law v. Garrett* (1878), 8 Ch. D. (C. A.) 26. This case does not directly raise the question of jurisdiction, but implies that the agreement gave jurisdiction to the Russian Court.

<sup>3</sup> *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17. Compare the fuller report of the proceedings in the Court below (1874), L. R. 9 Ex. 345. See also *Vallée v. Dumergue* (1849), 4 Ex. 290; 18 L. J. Ex. 398.

<sup>4</sup> *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345. See

5. *X*, a British subject, when residing and carrying on business in Western Australia, enters into partnership there with *A* for the working of a gold mine situate in Western Australia. The venture is not successful. There is a dissolution of partnership and under a decree of an Australian Court accounts are taken showing a deficiency, in respect of which a suit is brought in the Australian Court against *X*, and judgment given for 1,000%. *X* is not in Western Australia at the commencement of the suit nor at any time during its continuance; nor is he at any time resident or domiciled there. He does not appear to the writ issued in the Australian suit, nor does he agree to submit to the jurisdiction of the Court of Western Australia. The writ is served upon him in England, and he is kept informed of the proceedings in Western Australia. The Western Australian Court has no jurisdiction.<sup>1</sup>

6. *X*, an Englishman resident and domiciled in England, is the tenant of land in France. *X* is sued in a French Court by his landlord, *A*, for rent due from *X*. Constructive notice is given to *X* in accordance with the provisions of French law, but he has no other notice of the proceedings and does not appear to defend the action. The French Court (*semble*) has no jurisdiction.<sup>2</sup>

RULE 84.<sup>3</sup>—In an action *in personam* the Courts of a foreign country do not acquire jurisdiction either—

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country,<sup>4</sup> or
- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country.

also *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; 20 L. J. Q. B. 284. The result is that an action can be maintained in England against *X*, on the Australian judgment, given nominally against the chairman. See "Effect of Foreign Judgments," chap. xvii.

<sup>1</sup> *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302.

<sup>2</sup> See p. 366, *ante*.

<sup>3</sup> As to clause 1, see *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; as to clause 2, *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685, 686, judgment of P. C., with which contrast *Beequet v. MacCarthy* (1831), 2 B. & Ad. 951, and judgment in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161.

<sup>4</sup> See *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302, and pp. 56, 57, *ante*.



## Comment and Illustrations.

*Clause 1.* "Whilst we think," it is laid down by the Court of Queen's Bench, "that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest*,<sup>1</sup> we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France."<sup>2</sup>

This statement, though not quite decisive, appears to negative the claim made by the Courts of some foreign countries, and especially of Scotland,<sup>3</sup> to ground jurisdiction in an action *in personam* on the mere fact of the possession by the defendant of property lying within the limits of the country to which the Courts belong.<sup>4</sup>

1. *X* is domiciled and resident in England. He possesses goods in a house in Edinburgh. *A* brings an action against *X* in the Court of Session for breach of contract in England. *X*'s goods in Edinburgh are arrested to found jurisdiction (*ad fundandam jurisdictionem*). The Court has no jurisdiction.<sup>5</sup>

2. *A* is a fruit merchant at Edinburgh. He brings an action in the Court of Session against the L. & N. W. Ry. Co. for damage to fruit of *A*'s, arising from the negligence of the defendants in the carriage thereof. The act of negligence takes place in England;

<sup>1</sup> 4 Bing. 703; and Rule 83, p. 361, *ante*.

<sup>2</sup> *Schibshy v. Westenholz* (1870), L. R. 6 Q. B. 155, 163, *per curiam*. See also *Foinet v. Barrett* (1885), 55 L. J. Q. B. 39.

<sup>3</sup> See *Piggott*, pp. 239, 240; *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 99; *Douglas v. Jones* (1831), 9 Sh. & D. 856; 1 Mackay, *Pract. of Court of Session*, pp. 171—177.

<sup>4</sup> See, however, p. 372, *ante*, as to the possibility of a contract with reference to land in a foreign country implying submission to the jurisdiction of the Courts of such country.

<sup>5</sup> *I.e.*, the Scotch Court is not a "Court of competent jurisdiction" in the opinion of English judges. *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 99. See, as to the ambiguity of the expression "Court of competent jurisdiction," pp. 354—356, *ante*, and compare Rule 104, p. 419, *post*, and the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 8.

*A* arrests movable property of the defendant's in Scotland. The Court has no jurisdiction.<sup>1</sup>

3. *A*, an Englishman resident in London, has a claim against *X & Co.*, an English company resident in London, in respect of a life policy granted to *N*. *X & Co.* have money in a bank in Scotland. *A* arrests the money due by the bank to *X & Co.*, and brings an action in the Court of Session against *X & Co.* on the policy. The Court has no jurisdiction.<sup>2</sup>

*Clause 2.* A dictum of Blackburn, J., has suggested that under the circumstances stated in clause 2, the judgment of a foreign Court would bind the defendant, *i.e.*, the Court would be a Court of competent jurisdiction.

The Privy Council, however, have distinctly held that these circumstances are not sufficient to give jurisdiction, and have thus stated and commented upon Blackburn's doctrine:—

"The words of Blackburn, J.'s judgment, in *Schibbsby v. Westenholz*,<sup>3</sup> . . . are these:—

" 'If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued.'

"Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might

<sup>1</sup> See *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 99. The Court has jurisdiction according to Scotch law.

<sup>2</sup> See, for the facts, *Parken v. Royal Exchange Co.* (8 Sec. ser. 365), cited 3 Macq. 109. In this case it was held that the Court of Session had jurisdiction according to Scotch law. But the case does not decide that it was a "Court of competent jurisdiction" in the sense in which the words are here used, *i.e.*, according to English law. Some doubt exists whether, even according to Scotch law, jurisdiction arising from arrestment goes beyond the right to deal with the property arrested. See *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 106, 107, opinion of Cranworth, L. C.; and Mackay, *Manual of Practice*, p. 59.

<sup>3</sup> L. R. 6 Q. B. 161.

“ be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court ; and, if this was what Blackburn, J., meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsby v. Westenholz*,<sup>1</sup> Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived ; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the *forum loci contractus*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.”<sup>2</sup>

It may, therefore, be concluded, at any rate with great probability, that, as stated in clause 2, the mere presence of a defendant in a country at a time when an obligation is incurred does not of itself give the Courts jurisdiction over him in respect of such obligation.

1. X, a British subject domiciled in England, has held an official position and resided in Italy. X, whilst residing there, is guilty of a fraud, but, before proceedings are commenced against him in respect thereof, he has returned to and taken up his permanent residence in England. An action, of which he has notice in England, is brought against him in respect of the fraud in an Italian Court, and judgment for 1,000*l.* is recovered. The Italian Court has no jurisdiction.<sup>3</sup>

2. X, a Swiss subject, when in Paris, enters into a contract with A that he will not carry on a certain trade in England or elsewhere. When X is residing in England he carries on the trade there in breach of his contract. A brings an action against X in a French Court. The French Court has no jurisdiction.<sup>4</sup>

<sup>1</sup> L. R. 6 Q. B. 161.

<sup>2</sup> *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685, 686, judgment of P. C.

<sup>3</sup> Suggested by *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670.

<sup>4</sup> *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371.

## CHAPTER XIV.

JURISDICTION IN ACTIONS *IN REM*.<sup>1</sup>

RULE 85.<sup>2</sup>—In an action or proceeding *in rem* the Courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country.

## Comment.

The foundation of jurisdiction in an “action *in rem*”—using these words in their very widest sense—is the power to deal with or dispose of the property, the title to which, or the possession whereof, is in question. If the sovereign of a country has in fact the power to transfer the ownership or possession of property, the judgment of his Courts in regard to such property is decisive in regard to the right to such property.<sup>3</sup>

“If the matter in controversy is land,” writes Story, “or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the *forum rei sitæ* is held absolutely conclusive.”<sup>4</sup>

“The same principle,” writes Story, “is applied to all . . . cases of proceedings *in rem*, against movable property, within the jurisdiction of the Court pronouncing the judgment. Whatever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer,

<sup>1</sup> As to the distinction between an action *in personam* and an action *in rem*. see *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, opinion of Blackburn, J.; *Meyer v. Ralli* (1876), 1 C. P. D. 358; *The City of Mecca* (1879), 5 P. D. 28; (1881) 6 P. D. (C. A.) 106; *In re Trufort* (1887), 36 Ch. D. 600; *Carr v. Francis, Times & Co.*, [1902] A. C. 176.

<sup>2</sup> See Story, s. 592.

<sup>3</sup> See Intro., General Principle No. III., p. 40, *ante*.

<sup>4</sup> Story, s. 591.

“ or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture [or of damage by collision], or of any the like nature, over which such Courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter (*res*).”<sup>1</sup>

These words are an authoritative statement of the principle accepted by English judges that the Courts of a country are Courts of competent jurisdiction<sup>2</sup> with regard to the title to, or possession of, movable not less than immovable property which is situate in that country, or, it may be added, which is at the moment under the actual and lawful control of the sovereign whom such Courts represent.

Our Rule, it should be noted, is of wide application. It applies not only to proceedings which are in strictness actions *in rem*, but also to proceedings such as the administration of a deceased person's property<sup>3</sup> which, though not strictly actions *in rem*, determine the title to property.

### Illustrations.

1. Goods belonging to *A*, an Englishman, are on board a Prussian ship which is wrecked in Norway. The goods are sold in Norway, as *A* alleges, wrongfully. *A* takes proceedings in a Norwegian Court to set aside the sale. The Norwegian Court has jurisdiction to determine the title to the goods.<sup>4</sup>

2. The right to the possession of English bills, drawn and accepted in England by English firms, is raised before a Norwegian Court whilst the bills are in Norway, in the hands of *N*, the agent of *X*, to whom the bills have been indorsed in England. The Norwegian

<sup>1</sup> Story, s. 592, cited with approval in *Castrique v. Inrie* (1870), L. R. 4 H. L. 414, 428, 429, opinion of Blackburn, J.

<sup>2</sup> But as to movable property not of exclusively competent jurisdiction. Compare, as to the principle of effectiveness, Intro., p. 40, *ante*; and as to the law governing the assignment of a movable, Rule 143, *post*. And see *Cammell v. Sewell* (1860), 5 H. & N. 728, 744, 745, judgment of Crompton, J.; *In re Queensland Mercantile, &c. Co.*, [1891] 1 Ch. 536, 545; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

<sup>3</sup> See chap. xvi., Rule 89, p. 391, *post*.

<sup>4</sup> See *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350 (Ex. Ch.).

Court has jurisdiction to determine the right to the possession of the bills.<sup>1</sup>

3. *N* dies domiciled in England leaving land and money in New York. The Courts of New York have jurisdiction to administer and to determine the right to succeed to *N*'s land and money in New York.<sup>2</sup>

<sup>1</sup> *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

<sup>2</sup> Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1, 19, language of Lord Cranworth, and p. 23, language of Lord Chelmsford. See chap. xvi., Rule 89, p. 391, *post*.

CHAPTER XV.

JURISDICTION IN MATTERS OF DIVORCE AND AS  
REGARDS VALIDITY OF MARRIAGE.

I. DIVORCE.

(A) WHERE COURTS HAVE JURISDICTION.

RULE 86.—The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce.<sup>1</sup>

This Rule applies to—

- (1) an English marriage,<sup>1</sup>
- (2) a foreign marriage.

Comment.

This divorce jurisdiction<sup>2</sup> of the Courts of a foreign country where the parties to a marriage are domiciled is not affected either by the country where the marriage is celebrated, or by the domicile or the nationality of the parties at the time of the marriage. Rule 86, moreover, applies as well to an "English marriage," *i.e.*, a marriage which, whether celebrated in England or elsewhere, is entered into by parties of whom the husband is at the time thereof domiciled in England, as to a "foreign marriage," by which term is meant any marriage which does not fall within the description or definition just given of an English marriage. A doubt, indeed, was at one time entertained whether the Court of any foreign country could, in the eyes of English tribunals, dissolve an English marriage. But this doubt has now been entirely

<sup>1</sup> *Bater v. Bater*, [1906] P. (C. A.) 209; *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; and see App., Note 12, "Theories of Divorce."

<sup>2</sup> *I.e.*, in the opinion of English judges, or according to the rules with reference to the conflict of laws maintained by English Courts.

removed, and the law on this point has been authoritatively laid down as follows :—

“ The law now unquestionably stands in this position : That the Court of the existing *bonâ fide* domicile for the time being of the married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country. It seems to me that that is the law now, applicable to this case” [viz., the case of British subjects originally domiciled in England who inter-married in England, and had been divorced in New York], “ because we have it as a fact that the domicile of the parties, through the husband, was an American domicile—a domicile in the State of New York.”<sup>1</sup>

“ When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. The opinions expressed by the English common law judges in *Lolley's Case*<sup>2</sup> gave rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled ; and the law of England was, in their lordships' opinion, correctly stated by Lord Westbury in *Shaw v. Gould*,<sup>3</sup> in these terms: ‘ The position that the tribunal of a foreign country, having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before, and at the time of, the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case*.’ ”<sup>4</sup>

The Court, moreover, of the country where the parties are domiciled at the time of the proceedings for divorce has jurisdiction

<sup>1</sup> *Bater v. Bater*, [1906] P. (C. A.) 209, 232, judgment of Collins, M. R.

<sup>2</sup> (1812), Russ. & Ry. 237 ; S. C., 2 Cl. & F. 567.

<sup>3</sup> (1868), L. R. 3 H. L. 85.

<sup>4</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 527, 528, judgment of Privy Council, cited with approval in *Bater v. Bater*, [1906] P. (C. A.) 209, 235, judgment of Romer, L. J.



to grant a divorce on any ground for which a divorce may be granted under the law of such country, even though such ground, *e.g.*, incompatibility of temper, is not a cause for which divorce could be obtained in the country, *e.g.*, England, where the parties were domiciled at the time of the marriage.<sup>1</sup> It may now, in short, be taken to be the established rule of English law, that domicile is the true test of divorce jurisdiction.

The parties at the time of the divorce under the law of the foreign country where they are then domiciled, *e.g.*, Sweden, may be still citizens or subjects of another country, and of a country, *e.g.*, Italy, under the law of which divorce does not exist. But even in this case the English Courts adhere, it is submitted, to the principle that domicile is the test of divorce jurisdiction, and hold that a Swedish Divorce Court has jurisdiction to dissolve the marriage of Italian citizens domiciled in Sweden. It must, however, be admitted that, where citizenship and domicile differ, cases of considerable nicety may arise, especially in dealing with the position of citizens of countries such as Italy, which make personal capacity depend, not upon domicile, but upon allegiance or nationality, and further do not recognise divorce as regards their own citizens.<sup>2</sup> But any difficulty will, by English Courts, now be almost certainly solved by treating any divorce as valid which is granted by the Divorce Court of the country where the parties are domiciled.<sup>3</sup>

### Illustrations.

1. *H* and *W* are British subjects domiciled in England. They there intermarry. *H* afterwards becomes domiciled in New York. *W* takes proceedings to obtain divorce in a New York Court. The Court has jurisdiction.<sup>4</sup>

2. The circumstances are the same as in Illustration 1, except that *W* takes proceedings for divorce on a ground which is a cause for divorce under the law of New York, but is not a ground on

<sup>1</sup> *Bater v. Bater*, [1906] P. (C. A.) 209; *Humphrey v. Humphrey* (1895), 33 Sc. L. R. 99; *Scott v. Attorney-General* (1886), 11 P. D. 128.

<sup>2</sup> See Fiore, ss. 117—134.

<sup>3</sup> A fraudulent pretence that the parties to divorce proceedings are domiciled in the foreign country, *e.g.*, New York, where the divorce is obtained, will in England invalidate the divorce. See Rule 93, *post*; *Bonaparte v. Bonaparte*, [1892] P. 402; and compare *Bater v. Bater*, [1906] P. 217—220, judgment of Sir J. Gorell Barnes, President.

<sup>4</sup> *Bater v. Bater*, [1906] P. (C. A.) 209.

which divorce could be obtained in England.<sup>1</sup> The Court has jurisdiction.

3. *H* and *W* are Italian subjects domiciled in Sweden. Under Italian law they could, under no circumstances, obtain a divorce in Italy. *H* takes proceedings to obtain divorce in a Swedish Court, and divorce is granted on a ground, *e.g.*, incompatibility of temper, for which a divorce could not be granted in England. The Court has (*semble*) jurisdiction.<sup>2</sup>

### (B) WHERE COURTS HAVE NO JURISDICTION.

RULE 87.—Subject to the possible exception herein-after mentioned, the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce.<sup>3</sup>

#### Comment and Illustrations.

This Rule certainly holds good as to English marriages.<sup>4</sup>

“In no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by whose tribunals the divorce was granted.”<sup>5</sup> The Scotch Courts have constantly claimed the right to dissolve English marriages where the parties have acquired no real domicile in Scotland, but have merely resided there a sufficient time to give the Scotch Courts jurisdiction, according to one view of Scotch law,<sup>6</sup> and this claim has been consistently re-

<sup>1</sup> *Bater v. Bater*, [1906] P. (C. A.) 209; and *Humphrey v. Humphrey* (1895), 33 Sc. L. R. 99; *Scott v. Attorney-General* (1886), 11 P. D. 128.

<sup>2</sup> *I.e.*, English Courts would hold that the Swedish Courts were Courts of competent jurisdiction, and that the divorce was valid, though apparently it would not be held valid in Italy.

<sup>3</sup> *Pitt v. Pitt* (1864), 4 Macq. 627; *Dolphin v. Robins* (1859), 7 H. L. C. 390; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Shaw v. Attorney-General* (1870), L. R. 2 P. & D. 156; *Sinclair v. Sinclair* (1798), 1 Hagg. Const. 294; *Tollemache v. Tollemache* (1859), 1 Sw. & Tr. 557; *Green v. Green*, [1893] P. 89.

<sup>4</sup> *Green v. Green*, [1893] P. 89.

<sup>5</sup> *Shaw v. Attorney-General* (1870), L. R. 2 P. & D. 156, 161, 162, per Lord Penzance.

<sup>6</sup> See, however, *Pitt v. Pitt* (1864), 4 Macq. 627, which makes it doubtful whether even, according to the law of Scotland, the Scotch Courts have, under such circumstances, the right to pronounce a divorce.

pudiated by English tribunals. In spite, therefore, of some doubts which have been expressed on the subject,<sup>1</sup> it must be taken now as clearly established that the Scotch Courts have, as regards, at any rate, any effects in England, no power to dissolve an English marriage where the parties are not really domiciled in Scotland;<sup>2</sup> and, further, that the same doctrine applies to all foreign Courts.<sup>3</sup>

*H* and *W*, a man and woman domiciled in England, are married at Greenwich. *H*, the husband, afterwards resides, but does not obtain a domicile, in Scotland. He then applies for and obtains a divorce from the Court of Session. The Court of Session has no jurisdiction to dissolve the marriage.<sup>4</sup>

*H* and *W*, a man and woman domiciled in England, are married at Greenwich. *H* afterwards resides, but does not obtain a domicile, in British India. While residing in India he petitions, under the Indian Divorce Act, No. IV. of 1869, s. 2, for and obtains a divorce from the Indian Divorce Court. Whether the Court has jurisdiction?<sup>5</sup>

Nor is there any reason to doubt that English tribunals apply the same rule to a foreign divorce purporting to dissolve a foreign marriage as to a foreign divorce purporting to dissolve an English marriage, and that, therefore, a foreign divorce is invalid in England, in the case of a foreign marriage, if the parties to the marriage are, at the time of the divorce, not domiciled in the country where the Court granting the divorce exercises jurisdiction.

*H* and *W*, domiciled French subjects, are married in France. While still retaining their French domicile they are divorced in Belgium, where they are residing. The Belgian Courts have probably no jurisdiction.<sup>6</sup>

<sup>1</sup> See expressions of Lord Chelmsford in *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 57.

<sup>2</sup> *Dolphin v. Robins* (1859), 7 H. L. C. 390, 414, judgment of Lord Cranworth.

<sup>3</sup> *Lolley's Case* (1812), 2 Cl. & F. 567; *McCarthy v. De Guix* (1831), *Ibid.* 568.

<sup>4</sup> *I.e.*, is not, in the opinion of English judges, a Court of competent jurisdiction, and the divorce is consequently invalid in England. See *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11; *Tollemache v. Tollemache* (1859), 1 Sw. & Tr. 557.

<sup>5</sup> *Semble*, the Indian Divorce Court is not, in the opinion of English judges, a Court of competent jurisdiction. See *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; and compare Rattigan, Law of Divorce (India), pp. 6—13, and App., Note 14, "Divorces under the Indian Divorce Act, &c."

<sup>6</sup> See *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 540, cited p. 262, *ante*; and *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, 442, cited p. 257, *ante*. The state-

*Exception.*—The Courts of a foreign country, where the parties to a marriage are not domiciled, have jurisdiction to dissolve their marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where at the time of the proceedings for divorce the parties are domiciled.

#### Comment.

In a case, the circumstances of which brought it within this Exception, the existence of the Exception, and the principle on which it rests, were thus judicially laid down :—

“ The only question that remains for consideration is this question of English law : Are we to recognise in this country the binding effect of a decree obtained in a State in which the husband is not domiciled if the Courts of the State in which he is domiciled recognise the validity of that decree ? This point has not been distinctly determined in the Courts of this country. . . .

“ The evidence, in the present case, shows that in the State of New York [where the parties were domiciled] the decision of [i.e., the divorce granted by] the Court of South Dakota [where the parties were not domiciled at the time of the divorce] would be recognised as valid. The point then is : Are we in this country to recognise the validity of a divorce which is recognised as valid by the law of the domicile ? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognised in the State of New York—the State of the domicile—as having affected and determined it. That being so, [H] and [W] his former wife, the present petitioner, have ceased to be husband and wife in the place where they were domiciled at the date of the decree. It seems to me logically to follow that this Court must recognise

ments of law in these cases are so wide that they clearly apply not only to English but to foreign marriages. Nice questions may, however, be raised as to the effect in England of a foreign divorce granted in a country where the parties are not domiciled. It may, for example, be suggested with some reason that the exception to Rule 49, p. 263, *ante*, may be applicable to the divorce jurisdiction of a foreign Court no less than to the divorce jurisdiction of the High Court. Note, further, the effect of the Exception to Rule 87.

“ that state of dissolved union—dissolved, that is, in one State and  
“ recognised as dissolved in the other State—and that it must be  
“ recognised as dissolved all over the world.”<sup>1</sup>

### Illustrations.

1. *H*, a domiciled citizen of the State of New York, marries in England *W*, a domiciled Englishwoman. *W*, when settled apart from *H*, though not domiciled in the State of South Dakota, obtains a divorce from *H*, who is then domiciled in New York. A Court of New York admits the jurisdiction of the Court of South Dakota and treats the divorce as valid. The divorce is valid in England, *i.e.*, the South Dakota Court, though the parties were not domiciled in South Dakota, is treated as having jurisdiction.<sup>2</sup>

2. *H* and *W*, Swedish subjects married in Sweden, are domiciled at Turin. While they are domiciled in Italy they obtain a divorce in Sweden. Italian Courts would apparently hold the divorce valid.<sup>3</sup> The divorce (*semble*) is valid in England.<sup>4</sup>

3. *H* and *W*, French citizens, domiciled in New York, obtain a divorce in France. If the divorce is in these circumstances valid in New York, it is (*semble*) valid in England; if, on the other hand, it is invalid in New York, it is also (*semble*) invalid in England.<sup>5</sup>

## II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 88.<sup>6</sup>—The Courts of a foreign country have (*semble*) jurisdiction to declare the nullity of any marriage celebrated in such country (?).

<sup>1</sup> *Armitage v. Attorney-General*, [1906] P. 135, 141, 142, judgment of Sir J. Gorell Barnes, Pres.

<sup>2</sup> *Ibid.*, 135.

<sup>3</sup> The doctrine maintained by Italian lawyers appears to be that divorce jurisdiction depends not upon the domicile, but upon the nationality of the parties. See Fiore, ss. 131, 132.

<sup>4</sup> *Armitage v. Attorney-General*, [1906] P. 135.

<sup>5</sup> The difference is that if the divorce is valid in New York, where the parties are domiciled, the case falls within the exception to Rule 87; if it is invalid in New York the case falls within Rule 87. Conf. *In re Stirling*, (1908) W. N. 130.

<sup>6</sup> See Story, ss. 595—597; *Roach v. Garvan* (1748), 1 Ves. Sen. 157; *Sinclair v. Sinclair* (1798), 1 Hagg. Const. 294; *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46.

## Comment.

This Rule has no reference to divorce. It means that the Courts of a foreign country where a marriage has been celebrated have, according to English law, a right to determine whether the acts gone through by the parties to the marriage constituted a valid marriage according to the laws of that country. This jurisdiction is independent of the domicile of the parties. Our Rule cannot be laid down as absolutely certain. There appears to be no reported case which precisely decides how far our Courts admit the jurisdiction of the Courts of a foreign country to determine the validity of a marriage there celebrated. But English Courts have assumed jurisdiction for themselves to determine the validity of a marriage celebrated in England, even in the case of parties not domiciled in England,<sup>1</sup> and there is no apparent reason why they should not concede an analogous jurisdiction to the Courts of a foreign country.

Two points are clear. First, the Courts of a country where a marriage is celebrated have no exclusive jurisdiction to determine its validity, for our Courts will determine the validity of a marriage celebrated abroad.<sup>2</sup> Secondly, English Courts do not attach much importance to any decision as to the validity of a marriage given by the Court of a foreign country, *e.g.*, Belgium, which is not the country, *e.g.*, France, where the marriage was celebrated, and it would seem that the Courts of a foreign country are not, in general at least, held by English judges to be Courts of competent jurisdiction for determining the validity of a marriage which does not take place in such foreign country.

"The validity of marriage," says Lord Stowell, "however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country on the validity of a marriage, not within its territories nor had between subjects of that country, would be universally binding. For instance, the

<sup>1</sup> *Simonin v. Mallae* (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97.

<sup>2</sup> *Ruding v. Smith* (1821), 2 Hagg. Const. 371. See *Kent v. Burgess* (1840), 11 Sim. 361; but compare *Roach v. Garvan* (1748), 1 Ves. Sen. 157. Jurisdiction to make a declaration of nullity may (*semble*) be given by the domicile of the respondent (*Johnson v. Cooke*, [1898] 2 Ir. R. 130), though the marriage was celebrated in another country.

“marriage alleged by the husband is a French marriage [*i.e.*, a marriage celebrated in France]. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England.”<sup>1</sup>

### Illustrations.

1. *H*, an Englishman, and *W*, an Englishwoman, domiciled in England, go through what purports to be the celebration of a marriage in France. *H* takes proceedings in a French Court to have the marriage declared invalid on account of the neglect of some of the forms required by French law. *Seem*, the French Court has jurisdiction to determine the validity of the marriage.<sup>2</sup>

2. *H* and *W*, an Englishman and an Englishwoman, domiciled in England, go through what purports to be the celebration of a marriage in France. Afterwards, when *H* and *W* are domiciled in Belgium, *H* obtains a sentence of nullity of marriage in a Belgian Court. Whether the Court has jurisdiction?<sup>3</sup>

<sup>1</sup> Judgment of Lord Stowell, *Sinclair v. Sinclair* (1798), 1 Hagg. Const. 297. Whether the mere residence of one or both of the parties in a foreign country gives the Courts of such country (in the opinion of our Courts) jurisdiction to adjudicate upon the *validity* of a marriage celebrated in another country, *e.g.*, England, is doubtful. Compare Rule 51, p. 268, *ante*, as to the jurisdiction of the High Court.

It has been judicially suggested that something may depend on the cause for which a decree or judgment of nullity is granted by a foreign Court. “It may possibly be that if a suit were brought for nullity on the ground of impotence, and the facts were established in favour of the petitioner, either in the Court of the domicile of the parties or in the Court of the country in which the marriage was celebrated, it might be reasonable to hold that such a decree ought to be treated as universally binding, but it does not at all follow, where the only matter in dispute is whether a marriage ought to be held valid in the country where it was celebrated, and its validity is challenged on the ground of want of compliance with the formalities required by the laws of another country, that the Courts of the former country are to be bound by a decision on the question of the validity of the marriage given in the other country, even though it be the country of the domicile of one of the parties. It certainly would be somewhat startling if this Court, having come to the conclusion that the marriage in question between the appellant and Philip was valid in England, should yet hold that the French decision that it was not a valid marriage was binding upon it.” *Ogden v. Ogden*, [1908] P. (C. A.) 46, 80, 81, judgment of C. A.

<sup>2</sup> See *Roach v. Garvan* (1748), 1 Ves. Sen. 157.

<sup>3</sup> *Sinclair v. Sinclair* (1798), 1 Hagg. Const. 294.

## NOTE.

BANKRUPTCY JURISDICTION OF FOREIGN COURTS.—English judges have hardly enunciated any general doctrine as to the bases of bankruptcy jurisdiction. Two questions which bear on the jurisdiction in bankruptcy, properly exercisable by a foreign tribunal, have called for consideration by our Courts.

*First.* What is the extra-territorial effect of a foreign bankruptcy as an assignment?

As to this see chap. xviii., Rules 109—113, pp. 429—434, *post*.

*Secondly.* What is the extra-territorial effect of a foreign bankruptcy as a discharge?

As to this, see chap. xviii., Rules 114—117, pp. 435—441, *post*.

As to the jurisdiction of the proper Court in Ireland or in Scotland to wind up a company in England, see Companies Act, 1862 (25 & 26 Vict. c. 89), s. 81. It is strictly analogous to the jurisdiction of the Court, as stated in Rules 60, 61, pp. 297—300, *ante*, in regard to winding-up a company in Ireland or Scotland respectively.



## CHAPTER XVI.

JURISDICTION IN MATTERS OF ADMINISTRATION  
AND SUCCESSION.

RULE 89.<sup>1</sup>—The Courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicile of the deceased.

## Comment and Illustration.

This Rule is merely an application or result of Rule 85. There is no reason, it may be added, to suppose that English Courts deny to foreign tribunals in matters of administration as extensive a jurisdiction as they claim for themselves.

*N*, an Englishman domiciled in England, dies in England intestate, leaving 10,000*l.* in New York. Administration is taken out in New York. The New York Courts have jurisdiction to administer the 10,000*l.*, and if they see fit, to determine who are the persons entitled to succeed beneficially to the distributable residue of the 10,000*l.*<sup>2</sup>

RULE 90.<sup>3</sup>—The Courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country.

<sup>1</sup> See Story, ss. 591, 592, cited pp. 378, 379, *ante*, and Rule 85, p. 378, *ante*; and compare Rule 143, p. 519, *post*.

<sup>2</sup> Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1.

<sup>3</sup> Compare *In re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402; *Deglioni v. Crispin* (1866), L. R. 1 H. L. 301. Compare *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; and *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453.

### Comment.

If a deceased person is at the moment of his death domiciled abroad, the Courts of his domicile have jurisdiction, though not necessarily exclusive jurisdiction, to decide upon the right to the succession to his property.

“The rule to be extracted from [the] cases appears to be this, “that although the parties claiming to be entitled to the estate of “a deceased person may not be bound to resort to the tribunals “of the country in which the deceased was domiciled, and although “the Courts of this country may be called upon to administer the “estate of a deceased person domiciled abroad, and in such case “may be bound to ascertain as best they can who, according to the “law of the domicile, are entitled to that estate, yet where the title “has been adjudicated upon by the Courts of the domicile, such “adjudication is binding upon, and must be followed by, the “Courts of this country.”<sup>1</sup>

### Illustrations.

1. *T* dies domiciled in France; he leaves money, goods, &c. both in France and in England. The French Courts have jurisdiction to determine whether *A* is or is not entitled to succeed to *T*'s money, &c. in France and in England.<sup>1</sup>

2. *T*, an Englishman and a British subject, dies domiciled in Portugal. He leaves at his death goods in England. *A* claims to be, under Portuguese law, entitled to succeed to *T*'s movable property, and *inter alia* to the English goods. *A* would not be, according to English law, a legitimate son of *T*. The Portuguese Courts have jurisdiction to determine whether *A* is entitled to succeed to *T*'s movables.<sup>2</sup>

<sup>1</sup> *In re Trufort* (1887), 36 Ch. D. 600, 611, per Stirling, J.

<sup>2</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

## CHAPTER XVII.

EFFECT OF FOREIGN JUDGMENTS IN ENGLAND.<sup>1</sup>

## I. GENERAL.

*(i) No Direct Operation.*

RULE 91.—A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rule 104.<sup>2</sup>

*Comment.*

A foreign judgment<sup>3</sup> does not operate directly in England. The judgment of, *e.g.*, a French Court, cannot be enforced here by execution.

*(ii) Invalid Foreign Judgments.*

RULE 92.—Any foreign judgment which is not pronounced by a Court of competent jurisdiction<sup>4</sup> is invalid.<sup>5</sup>

Whether a Court which has pronounced a foreign judgment is, or is not, a Court of competent jurisdiction in respect of the matter adjudicated upon by the Court is to be determined in accordance with Rules 79 to 90.

<sup>1</sup> As to foreign judgments, see Westlake (4th ed.), chap. xvii.; Story, ss. 584—618 l; Wharton, ss. 646—675; Savigny, Guthrie's transl. (2nd ed.), pp. 240—242; Foote, chap. xi., pp. 547—583; Nelson, pp. 338—375; and generally, see Piggott, Foreign Judgments.

<sup>2</sup> *I.e.*, Rule as to extension of certain judgments of Superior Court in one part of United Kingdom to any other part; and see the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54).

See also Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31); and Piggott, pp. 362, 363. The effect of this Act is purposely not embodied in this Digest.

<sup>3</sup> For definition of “foreign judgment,” see p. 354, *ante*.

<sup>4</sup> For meaning of “Court of competent jurisdiction,” see Rule 79, p. 354, *ante*.

<sup>5</sup> *I.e.*, of course, invalid in England. See *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 684, *per curiam*.

The validity of a foreign judgment is not, in general, affected by the fact that the Court which pronounces the judgment is not a proper Court.<sup>1</sup>

#### Comment.

A judgment pronounced by a Court which is not a "Court of competent jurisdiction" in the sense in which the term is used in this Digest is a decision given by a Court with reference to a matter which, according to the principles maintained by our judges, the foreign Court had no right to determine. Hence the judgment is necessarily invalid in England, or, to look at the same thing from another point of view, the right acquired under the foreign judgment is not "duly" acquired, and is therefore not a right which is entitled to recognition in England.<sup>2</sup>

*Question.*—Is a judgment pronounced by a foreign tribunal which is a Court of competent jurisdiction, but is not a "proper Court,"<sup>3</sup> valid?

This question must almost certainly be answered in the affirmative, though the matter is one which requires some explanation.<sup>4</sup>

The general current of authority strongly, if not decisively, favours the validity of such a judgment.

Thus it has been held that it is no answer to an action in England on a French judgment against a French citizen domiciled in France, that the Court giving the judgment was not a Court of competent jurisdiction according to French law, *i.e.*, was not a proper Court,<sup>5</sup> and with reference to this case Westlake writes: "If the foreign suit was not brought in the right Court of a country which, as a territory, was internationally competent, this was matter of defence which ought to have been pleaded in that Court. . . . And the party cannot take the objection in England."<sup>6</sup>

<sup>1</sup> *Vanquelin v. Bouard* (1863), 33 L. J. C. P. 78; *Pemberton v. Hughes*, [1899] 1 Ch. (C. A.) 781; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

But contrast *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429. For meaning of "proper Court," see Rule 79, p. 354, *ante*.

<sup>2</sup> See Intro., General Principle No. I., p. 23, *ante*.

<sup>3</sup> See Rule 79, p. 354, *ante*.

<sup>4</sup> Contrast *Vanquelin v. Bouard* (1863), 15 C. B. (N. S.) 341; 33 L. J. C. P. 78; and Westlake (4th ed.), p. 373, in favour of the validity of such judgment, with the opinion of Blackburn, J., in *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, cited p. 395, *post*. See also *Godard v. Gray* (1870), L. R. 6 Q. B. 139, 149.

<sup>5</sup> *Vanquelin v. Bouard* (1863), 15 C. B. (N. S.) 341.

<sup>6</sup> Westlake (4th ed.), p. 371. Compare 3rd ed., p. 349.

On the other hand, judicial language has certainly been used which seems to imply that the validity of a foreign judgment may depend on the Court pronouncing it being a proper Court. Thus with reference to the validity of a judgment *in rem* it has been laid down: "We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits [*i.e.*, whether the Court was a Court of competent jurisdiction]; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction [*i.e.*, whether the Court is a proper Court]. If these conditions are fulfilled, the adjudication is conclusive against all the world."<sup>1</sup> Whence it might be inferred that, at any rate in the opinion of Lord Blackburn, it was a condition of the validity of a foreign judgment that it should be pronounced by a proper Court, or, in other words, that the Court giving the judgment should possess not only extra-territorial competence, but also intra-territorial competence; and no doubt at first sight it appears a paradox that a judgment pronounced by a foreign, *e.g.*, by a French, Court, which has not authority to give judgment under French law, should ever be held valid in England.

The difficulties of the question raised and the apparent difference of opinion between high authorities may be removed by the following considerations.

When a foreign, *e.g.*, a French, Court, which from an international point of view is a Court of competent jurisdiction, delivers a judgment in excess of the authority conferred upon the Court by French law, the judgment, though obviously not pronounced by a proper Court, may bear one of two different characters. It may be *irregular*, but have validity in France until it is set aside; or it may be a complete *nullity*, and have no legal effect whatever in France.

If, on the one hand, the judgment is simply irregular, and, until it is set aside, gives *A* a right in France, *e.g.*, to the payment of a sum of money by *X*, then it ought to be held valid in England, for *A* has acquired a right under French law, and English Courts are not Courts of Appeal from the judgment of a foreign tribunal.

<sup>1</sup> *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, opinion of Blackburn, J.

If, on the other hand, the judgment is in France a mere nullity, and *A*, in whose favour it is given, acquires under it no rights in France, then it should be treated as invalid in England, for *A* has acquired no right under French or any other law which he is entitled to enforce in England.<sup>1</sup>

To this it may be added that a judgment in fact pronounced by a foreign Court of competent jurisdiction is far more likely to be irregular than void. The practical result, therefore, follows that a judgment pronounced by a foreign Court of competent jurisdiction is generally valid in England, even though not pronounced by a proper Court.

### Illustrations.

1. *A* obtains judgment in a French Court against *X*, a British subject, for 100*l*. The debt has been contracted, if at all, in England. *X* has never been in France, and there is no circumstance in the case giving the French Court, in the opinion of English judges, a right to pronounce judgment against *X* (*i.e.*, the French tribunal is not a Court of competent jurisdiction).<sup>2</sup> The judgment is invalid.<sup>3</sup>

2. *X* is the owner of a British ship. An action *in rem* is brought by *A* against the ship in a Louisiana Admiralty Court. The ship is not, and never has been, in fact, under the control of the Court, nor within the territorial limits of the State of Louisiana. The Court gives judgment in favour of *A*. The judgment is invalid.<sup>4</sup>

3. *X*, a British subject, is the owner of a British ship. At the suit of *A*, the ship is arrested when just outside the territorial waters of France, and an action *in rem* is brought against the ship in a French Admiralty Court. Judgment is given against the ship. The judgment is invalid.<sup>5</sup>

4. The Scotch Court of Session, at a time when *H* is domiciled in England, grants *H* a divorce from his wife, *W*. The Court of

<sup>1</sup> See Intro., General Principle No. I., p. 23, *ante*.

<sup>2</sup> See as to jurisdiction of foreign Courts in actions *in personam*, Rules 83, 84, pp. 361, 374, *ante*.

<sup>3</sup> *Schibsby v. Westernholz* (1870), L. R. 6 Q. B. 155.

<sup>4</sup> See as to jurisdiction of foreign Courts in actions *in rem*, Rule 85, p. 378, *ante*.

<sup>5</sup> Compare *Borjesson v. Carlberg* (1878), 3 App. Cas. 1316; *Simpson v. Fogo* (1860), 1 J. & H. 18; (1863), 1 H. & M. 195; but see exception to Rule 97, p. 405, *post*.

Session not being a Court of competent jurisdiction,<sup>1</sup> the sentence of divorce is invalid.

5. *A*, a French citizen resident in France, obtains judgment against *X*, a French citizen resident in France, for a debt due from *X* to *A*. The French Court has under French law jurisdiction only over traders. *X* is not a trader. The French Court is not a proper Court in which to sue *X*. No steps are taken by *X* to get the judgment of the French Court set aside. The judgment is (probably) valid.<sup>2</sup>

6. *H* and *W*, husband and wife, are domiciled in Florida. *H* takes proceedings in the Florida Divorce Court to obtain a divorce from *W*. *W* does not appear. *H* obtains a divorce. There is an irregularity in the proceedings which might have given ground for an appeal, and which might on such appeal possibly have caused the divorce to be declared void. There is no appeal. The judgment of divorce is valid.<sup>3</sup>

RULE 93.<sup>4</sup>—A foreign judgment is invalid which is obtained by fraud.

Such fraud may be either

- (1) fraud on the part of the party in whose favour the judgment is given; or
- (2) fraud on the part of the Court pronouncing the judgment.

#### Comment.

Any judgment whatever,<sup>5</sup> and therefore any foreign judgment, is, if obtained by fraud, invalid. The party contesting the validity

<sup>1</sup> See as to jurisdiction of foreign Courts in matters of divorce, Rules 86, 87, pp. 381, 384, *ante*.

<sup>2</sup> *I.e.*, in England. *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341; 33 L. J. C. P. 78.

<sup>3</sup> *Pemberton v. Hughes*, [1899] 1 Ch. (C. A.) 781, 792, judgment of Lindley, M. R.; pp. 794, 795, of Rigby, L. J.; and p. 796, judgment of Vaughan Williams, L. J.

<sup>4</sup> As to effect of fraud on validity of judgment generally see *Duchess of Kingston's Case* (1776), 2 Sm. L. C. (9th ed.), 812; compare *Nouvion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 249, judgment of Cotton, L. J.; on judgments *in personam*, *Aboulloff v. Oppenheimer* (1882), 10 Q. B. D. (C. A.) 295; *Tadala v. Lauree* (1840), 25 Q. B. D. (C. A.) 310; *Bowles v. Orr* (1835), 1 Y. & C. 464; on judgments *in rem*, *Story*, s. 592; on judgments of divorce, *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 71, language of Lord Cranworth; p. 77, language of Lord Chelmsford.

<sup>5</sup> *Ochsenbein v. Papelier* (1873), L. R. 8 Ch. 695.

of a judgment may prove fraud even though this cannot be done without re-trying the questions adjudicated upon by the foreign Court.

“ There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits.

“ Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff v. Oppenheimer*.<sup>1</sup> At the time when that case was decided—namely, in 1882—there was a long line of authorities, including *Bank of Australasia v. Nias*,<sup>2</sup> *Ochsenbein v. Papelier*,<sup>3</sup> and *Cammell v. Sewell*,<sup>4</sup> all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's Case*<sup>5</sup> the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff v. Oppenheimer*, and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the

<sup>1</sup> 10 Q. B. D. 295.

<sup>2</sup> 16 Q. B. 717.

<sup>3</sup> L. R. 8 Ch. 695.

<sup>4</sup> 5 H. & N. 728.

<sup>5</sup> 10 Q. B. D. 295.



“foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the Court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the Court below was or was not false, was the very question of fact that had been adjudicated on in the foreign Court; and, notwithstanding that was so, when the Court came to consider how the two rules, to which I have alluded, could be worked together they said: ‘Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to re-try the merits, you are entitled to do so according to the law of this country.’ I cannot read that case in any other way.”<sup>1</sup>

The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained, but it may (conceivably, at any rate) be fraud on the part of the foreign Court giving the judgment, as where a Court gives judgment in favour of *A*, because the judges are bribed by some person, not the plaintiff, who wishes judgment to be given against *X*, the defendant.

The doctrine that fraud vitiates a judgment applies in principle to foreign judgments of every class, but the extent of its application differs somewhat according to the nature of the judgment.

It is clearly applicable to a judgment *in personam*,<sup>2</sup> where, be it noted, the rights in question are the rights of the litigants or of their representatives.

It applies further, at any rate, between the litigants, to a judgment *in rem*. “The doctrine, however,” writes Story [that in proceedings *in rem*, the judgment of a Court of competent jurisdiction is conclusive], “is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and without fraud; for if fraud has intervened, it will doubtless

<sup>1</sup> *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310, 316, 317, per Lindley, L. J.

<sup>2</sup> *Ibid.*, 310.

“avoid the force and validity of the sentence.”<sup>1</sup> But it is questionable whether the fraud which, as between the litigants, vitiates a judgment *in rem* affects the rights of third persons, *e.g.*, *bonâ fide* purchasers, who, in ignorance of the fraud, acquire under or in consequence of the judgment a title to the *res*, *e.g.*, a ship, affected thereby. “Fraud,” it has been said by Mr. Justice Blackburn, in reference to this very question, “will indeed vitiate everything; “though we may observe that there is much force in what “Mr. Mellish suggested in the course of his argument in this case, “that even if there had been fraud on the part of the litigants, or “even of the tribunal, it would be very questionable whether it “could be set up against a *bonâ fide* purchaser who was quite “ignorant of it.”<sup>2</sup>

It applies again, though in a more limited way, to a judgment or sentence of divorce. If the fraud or collusion of the parties induces the Divorce Court of a foreign country to believe that it has jurisdiction where, according to the doctrine maintained by English tribunals, it has no jurisdiction, then the judgment or sentence of divorce is rendered in England invalid by such fraud or collusion.<sup>3</sup> But if the fraud or collusion does not go to the root of the foreign Court’s jurisdiction, but merely, by the pretence of facts which do not exist, or the suppression of facts which do exist, induces the foreign Court to grant a divorce which it would not otherwise have granted, then (*semble*), as long as such divorce continues in force in the country where it is granted, it cannot be invalidated in England merely on account of such fraud or collusion. In many of the judgments as to the effect of fraud on a judgment or sentence of divorce it has been said that the Courts will not recognise the decree of a foreign tribunal where the judgment has been obtained by the collusion or fraud of the parties. “But I think, when those cases are examined, that the collusion or “fraud which was being referred to was in every case . . . “collusion or fraud relating to that which went to the root of the “matter, namely, the jurisdiction of the Court. In other words [they “were], as an illustration, cases where the parties have gone to the “foreign country and were not truly domiciled there, and repre-

<sup>1</sup> Story, s. 592.

<sup>2</sup> *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 433, opinion of Blackburn. J. See Exception, p. 406, *post*; and Rule 143, p. 519, *post*.

<sup>3</sup> *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11; *Shaw v. Gould* (1868), L. R. 3 L. L. 55; *Bonaparte v. Bonaparte*, [1892] P. 402.

“ sented that they were domiciled there, and so had induced the Court  
 “ to grant a decree. The collusion or fraud in those cases goes to the  
 “ root of the jurisdiction. There is no jurisdiction if there is no  
 “ domicil, and therefore collusion and fraud entered into many of  
 “ those cases in a way that went to fortify the view that where  
 “ there is no domicil there is no jurisdiction. But supposing that  
 “ what was kept back was something that would have made the  
 “ Court come to a different conclusion than it would otherwise have  
 “ done, I can see no valid reason in the judgments in cases  
 “ affecting status for treating the decree as a nullity, unless it is  
 “ set aside.”<sup>1</sup>

If a divorce judgment “ is a judgment *in rem*, or stands on the  
 “ same footing, as I think it undoubtedly does, can it be impeached  
 “ in proceedings taken in this country by a person not a party  
 “ to the judgment at all? Can proceedings effectually be taken  
 “ in this country while that judgment stands unimpeached in the  
 “ country where it was made?”<sup>2</sup>

#### Illustrations.

1. *A* obtains in a Russian Court a judgment against *X* that *X* shall either deliver to *A* certain goods of *A*'s, then, as alleged, in *X*'s possession, or pay *A* a sum equivalent to 1,050*l*. The judgment, which is affirmed on appeal to a superior Russian Court, is obtained by *A*'s fraudulently concealing from the Court that at the very moment when the action is brought the goods are in the possession of *A*. The judgment is invalid.<sup>3</sup>

2. *A* brings an action in Sicily against *X* to recover money alleged to be due on certain bills of exchange. *A* obtains judgment against *X* by fraudulently representing to the Italian Court that the bills of exchange were given under the authority of *X* and for mercantile transactions, whereas they were given without *X*'s authority for gambling debts. The judgment is invalid.<sup>4</sup>

3. *A* obtains a judgment against *X* in a foreign Court. The judgment is given against *X* because *X* declines to bribe the foreign Court. The judgment is invalid.<sup>5</sup>

<sup>1</sup> *Bater v. Bater*, [1906] P. 218, judgment of Sir J. Gorell Barnes, Pres.

<sup>2</sup> *Ibid.*, 209, 228, per Collins, M. R.; conf. judgment of Romer, L. J., pp. 236, 237.

<sup>3</sup> *Aboulloff v. Oppenheimer* (1882), 10 Q. B. D. (C. A.) 295.

<sup>4</sup> *Iadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310.

<sup>5</sup> It is difficult to find any reported case of fraud on the part of a tribunal, but it is admitted that such fraud would invalidate the judgment of a Court.

4. *A* commences an action against *X* in France. It is agreed between *A* and *X* in France that the action shall be dropped and the whole matter in dispute be referred to arbitration in London. *X* under this arrangement returns to England. *A* fraudulently, and in breach of this arrangement, continues the action in France, and recovers judgment against *X* in a French Court for a sum equivalent to 220*l*. The judgment is invalid.<sup>1</sup>

5. *X* is the owner of a British ship. *A*, when the ship is in France, brings an action *in rem* against the ship, and by means of fraud obtains from the French Court a judgment against the ship, under which it is assigned to *A* as owner. The judgment is invalid.<sup>2</sup>

6. *H* and *W* marry and are domiciled in England. They wish to obtain a divorce, which they cannot do in England. *W* takes divorce proceedings against *H* in Scotland. They fraudulently and collusively pretend that they are domiciled in Scotland. A divorce is granted. The divorce is invalid.<sup>3</sup>

7. In 1880 *W* marries *L*, her first husband. In 1886 *L* petitions for divorce from *W*, making *H*, afterwards *W*'s second husband, co-respondent. *W* presents cross petition charging *L* with cruelty. Both petitions are dismissed. *L* then goes from England to New York, and obtains a New York domicile. *W* and *H* also go to New York, and *W* there obtains a divorce from *L*, but the proceedings in England are not disclosed; if they had been disclosed, a divorce would not have been granted at New York. After the divorce *W* and *H* intermarry. Sixteen years afterwards *H* petitions in the English Divorce Court for declaration of nullity of marriage in New York on the ground that the New York divorce was obtained by fraud. Petition dismissed, *i.e.*, the divorce held valid.<sup>4</sup>

RULE 94.—A foreign judgment is, possibly, invalid when the Court pronouncing the judgment refuses to give such recognition to the law of other nations as is

<sup>1</sup> *Ochsenbein v. Papelier* (1873), L. R. 8 Ch. 695. See, especially, language of Selborne, C., p. 698.

<sup>2</sup> Compare *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 433, opinion of Blackburn, J.

<sup>3</sup> *Bonaparte v. Bonaparte*, [1892] P. 402. See *Shaw v. Gould* (1868), L. R. 3 H. L. 55.

<sup>4</sup> *Bater v. Bater*, [1906] P. (C. A.) 209.

required by the principles of private international law (?).<sup>1</sup>

### Illustration.

*D*, domiciled in England, mortgages in England to *A* a ship lying at Liverpool. The ship is seized at New Orleans under a judgment against *D*. *A*, as being, under English law, the owner of the ship, opposes the sale of the ship before the Louisiana Court. The ship is sold under a writ of *fiery facias* for the benefit of *D*'s creditor, and the Louisiana Court refuses to recognise the right to the ship acquired by *A* in England. The refusal is based on the ground that the right was not acquired in such a manner as to be valid by the law of Louisiana. The ship is purchased by *X*. *A* and not *X* is, in England, the owner of the ship, *i.e.*, the Louisiana judgment is invalid, and *X* has not in England a good title to the ship against *A*.<sup>2</sup>

RULE 95.—A foreign judgment may sometimes be invalid on account of the proceedings in which the

<sup>1</sup> *Simpson v. Fogo* (1863), 32 L. J. Ch. 249; 1 H. & M. 195; (1860), 1 J. & H. 18; 29 L. J. Ch. 657. See, however, Westlake, pp. 191, 192; Foote, pp. 560, 561, 575; Piggott, p. 247.

<sup>2</sup> *Simpson v. Fogo* (1863), 1 H. & M. 195.

"Under these circumstances, having to come to a decision in a case which is  
"entirely new in specie, and which will never arise, as it seems to me, in any  
"other country in the world except Louisiana, I confess I yield to the view of  
"that section of the judges who considered, in the case of *Castrique v. Imrie*,  
"that even a judgment *in rem* may lose its binding force where there appears  
"on the face of it a perverse and deliberate refusal to recognise the law of  
"the country by which title has been validly conferred. The law of England,  
"being by the comity of nations that which must govern the transfer—the transfer  
"being in England, the parties resident here—the ship an English ship at sea  
"on a voyage from an English port; when I find a foreign Court saying 'We will  
"deal with that ship as the property of the person who has already transferred  
"it,' that seems to me to be so contrary to law, and to what is required by the  
"comity of nations, that I am bound to hold that the property acquired by the  
"Bank of Liverpool must prevail against a sale made on the principle entertained  
"by a foreign Court, that, as between mortgagors and mortgagees, the mort-  
"gagees' interest is wholly to be extinguished, and the right of the mortgagors  
"is paramount and absolute." *Simpson v. Fogo* (1863), 1 H. & M. 195, 247,  
judgment of Page-Wood, V.-C. These words show that the principle established  
by or relied upon in *Simpson v. Fogo* is (even if not of doubtful validity) at any  
rate of very narrow application. It would seem only to apply where the Court  
of a foreign country bases its judgment on the deliberate refusal to recognise a  
right duly acquired under the law of England.

judgment was obtained being opposed to natural justice (*e.g.*, owing to want of due notice to the party affected thereby). But in such a case the Court is (generally) not a Court of competent jurisdiction.<sup>1</sup>

#### Comment.

With the justice of the decision arrived at by a foreign Court of competent jurisdiction our Courts have no concern. A foreign judgment may be perfectly valid, though unjust to the party against whom it is given. But the mode in which a Court proceeds may, it is said, be so opposed to natural justice as to invalidate the judgment of the Court.

This opposition, however, to natural justice in the procedure of a Court generally consists of want of due notice of action to an absent defendant affected by the judgment. This is, in reality, a ground of objection to the jurisdiction of the foreign Court, and it is, to say the least, arguable that, whenever a foreign judgment is impeachable on the ground of opposition to natural justice, it is invalid, if at all, on the ground that the Court is not a Court of competent jurisdiction.<sup>2</sup>

The objection, moreover, that a defendant did not receive due notice of action can be taken (it is submitted) only where the defendant at the commencement of the action is not resident in the country where it is brought. If he is, any notice, it is conceived, is sufficient which is in accordance with the law of the foreign country.<sup>3</sup>

#### Illustrations.

1. A judgment is given in a Danish Court with regard to the validity of a will. The Court is constituted, in accordance with Danish law, of persons some of whom are interested in the property in dispute. The judgment in favour of such persons is opposed to natural justice, and is invalid.<sup>4</sup>

2. A obtains a judgment in France against X, who is not a

<sup>1</sup> *Buchanan v. Rucker* (1808), 9 East, 192; *Henderson v. Henderson* (1844), 6 Q. B. 288; 13 L. J. Q. B. 274, 277; *Sheehy v. Professional Life Assurance Co.* (1857), 2 C. B. N. S. 211; 26 L. J. C. P. 302; *Craucley v. Isaacs* (1867), 16 L. T. 529; and compare, for good statement of law, Piggott, pp. 167—174.

<sup>2</sup> Compare *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155.

<sup>3</sup> Compare Foote, pp. 561—563.

<sup>4</sup> *Price v. Dewhurst* (1837), 8 Sim. 279.

French citizen, and who is not in France, and has never been resident in France; and the only notice given to *X* is, in accordance with French law, a service of summons on a French official. *X* does not appear, and judgment is obtained against him. The judgment is invalid.<sup>1</sup>

RULE 96.—A foreign judgment shown to be invalid under any of the foregoing Rules 92 to 95, is hereinafter termed an invalid foreign judgment.

RULE 97.—An invalid foreign judgment has (subject to the possible exception hereinafter mentioned) no effect.<sup>2</sup>

#### Comment.

When it is established that a foreign judgment to which effect is to be given in England is invalid, the judgment has no effect in England.

A Scotch or Irish judgment, however, which, in conformity with Rule 104, is extended to England by means of a certificate registered under the Judgments Extension Act, 1868, cannot (apparently) be shown in England to be invalid. The judgment itself, therefore, must be treated as a valid judgment in England unless and until it is set aside by proper proceedings in Scotland or Ireland.<sup>3</sup>

#### Illustrations.

1. *A* obtains judgment in a French Court against *X* for a debt amounting to 100%. The judgment is invalid. *A* cannot maintain an action against *X* on the judgment in England.<sup>4</sup>

2. The Scotch Court of Session divorces *H* from his wife, *W*. The divorce is invalid. *H*, during the lifetime of *W*, marries *N* in

<sup>1</sup> Compare *Schibsby v. Westernholz* (1870), L. R. 6 Q. B. 155. In *Schibsby v. Westernholz*, the defendant, residing in England, had notice of the action substantially equivalent to that which might have been given to absent defendants under C. L. P. Act, 1852, ss. 18, 19. The French procedure could not, therefore, be condemned by an English Court as contrary to natural justice. The real objection to it was that the French Court was not under the circumstances a Court of competent jurisdiction.

<sup>2</sup> *I.e.*, in England.

<sup>3</sup> Note that if an action be brought on a Scotch or Irish judgment in England, the judgment may, like any other foreign judgment, be shown to be invalid.

<sup>4</sup> *Schibsby v. Westernholz* (1870), L. R. 6 Q. B. 155.

England. The marriage with *N* is invalid, and *H* is liable to be convicted of bigamy.<sup>1</sup>

3. A foreign Admiralty Court gives a judgment *in rem* against an English ship. The judgment is invalid. If the ship comes to England the judgment cannot be enforced against the ship by an action *in rem*.<sup>2</sup>

*Exception.*—An invalid foreign judgment *in rem* may possibly have an effect in England as an assignment, though not as a judgment.<sup>3</sup>

#### Comment.

A foreign judgment given in an action *in rem*, e.g., against a ship, may, as already pointed out, though invalid as a judgment, and indeed for any purpose as between the litigant parties, have an effect in England as a valid assignment of the ship to a third party; for if the ship, whilst still in the country where the judgment was given, is assigned under or by virtue of the judgment, e.g., by the sale of the ship, under the order of the Court giving the judgment, to a *bonâ fide* purchaser, the assignment is valid by the *lex situs*, and therefore *primâ facie* valid everywhere; in other words, the judgment has an effect as an assignment.

#### Illustration.

A foreign Admiralty Court gives a judgment *in rem* against a British ship owned by *A*, an Englishman. The judgment is obtained by the fraud of the plaintiff. The ship is under the judgment sold to *X*, a *bonâ fide* purchaser, who knows nothing of the fraud. When the ship comes to England, *A* lays claim to the ship, and shows that the foreign judgment was obtained by fraud. *Semble*, that *X* has a good title as against *A*, i.e., that the judgment, though invalid, has an effect in England as an assignment.<sup>3</sup>

<sup>1</sup> *Lolley's Case* (1812), 2 Cl. & F. 567; see *Shaw v. Gould* (1868), L. R. 3 H. L. 55.

<sup>2</sup> See as to such an action, Rule 106, p. 425, *post*.

<sup>3</sup> See *Castrigue v. Imvie* (1870), L. R. 4 H. L. 414, 433, opinion of Blackburn, J.; and compare Rule 143, p. 519, *post*.



(iii) *Valid Foreign Judgments.*

RULE 98.—A foreign judgment, which is not an invalid foreign judgment under Rules 92 to 95, is valid, and is hereinafter termed a valid foreign judgment.

RULE 99.<sup>1</sup>—Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid.

RULE 100.<sup>2</sup>—A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

- (1) of fact,<sup>3</sup> or
- (2) of law.<sup>4</sup>

## Comment.

“The decisions of the Court of Queen’s Bench in *Bank of Australasia v. Nias*,<sup>5</sup> of the Court of Common Pleas in *Bank of Australasia v. Harding*,<sup>6</sup> and of the Court of Exchequer in *De Cosse Brissac v. Rathbone*<sup>7</sup> . . . leave it no longer open to contend, unless in a Court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the

<sup>1</sup> *Alvon v. Furnival* (1834), 1 C. M. & R. 277; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Henderson v. Henderson* (1844), 6 Q. B. 288; *Robertson v. Struth* (1844), 5 Q. B. 941.

“A declaration upon the judgment of a foreign Court need not state that the Court had jurisdiction over the parties or the cause, every presumption being made in favour of a foreign judgment.” Bullen & Leake (3rd ed.), pp. 194, 195, note (a).

<sup>2</sup> *Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 284; *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241; 26 L. J. C. P. 19; *Ellis v. M’Henry* (1871), L. R. 6 C. P. 228, 238.

<sup>3</sup> *Henderson v. Henderson* (1844), 6 Q. B. 288; 18 L. J. Q. B. 274; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L. J. Ex. 238; Foote, p. 567.

<sup>4</sup> *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Scott v. Pilkington* (1862), 2 B. & S. 11; 31 L. J. Q. B. 81; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L. J. Ex. 238.

<sup>5</sup> 16 Q. B. 717; 20 L. J. Q. B. 284.

<sup>6</sup> 9 C. B. 661; 19 L. J. C. P. 345.

<sup>7</sup> 6 H. & N. 301; 30 L. J. Ex. 238.

"tribunal mistook either the facts or the law,"<sup>1</sup> and this holds whether the mistake be an error with regard either to foreign law or to English law, and whether such mistake do, or do not, appear on the face of the proceedings.<sup>2</sup> The rights acquired under a foreign judgment stand, in short, in the same position as other rights duly acquired under foreign law,<sup>3</sup> and are entitled to recognition to, at any rate, the same extent as other rights duly acquired under the law of any civilised country.

"The principle on which an action can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal, or that if such rights have not been in fact investigated and determined, it is because the parties, or one of them, have made default and not availed themselves of the opportunities afforded them by the foreign tribunal. In an action on a foreign judgment not impeached for fraud, the original cause of action is not re-investigated here, if the judgment was pronounced by a competent tribunal having jurisdiction over the litigating parties: *Godard v. Gray*;<sup>4</sup> *Schibsby v. Westernholz*.<sup>5</sup> The judgment is treated as *res judicata*, and as giving rise to a new and independent obligation which it is just and expedient to recognise and enforce."<sup>6</sup>

This general principle, though stated in reference to a judgment *in personam*, applies to every kind of judgment; it extends alike to a judgment *in personam*,<sup>7</sup> to a judgment *in rem*,<sup>8</sup> and to

<sup>1</sup> *Godard v. Gray* (1870), L. R. 6 Q. B. 139, 150, judgment of Blackburn, J. It was indeed at one time maintained that a foreign judgment was merely evidence of the cause of action, e.g., the debt in respect of which the judgment was given. See *Houlditch v. Donegal* (1824), 2 Cl. & F. 470, 477, language of Lord Brougham. But this doctrine may now be considered erroneous.

<sup>2</sup> *Godard v. Gray* (1870), L. R. 6 Q. B. 139. *Seem*, that *Meyer v. Ralli* (1876), 1 C. P. D. 358, must either be treated as depending upon the very special circumstances of the case in which the parties admitted that the law of the foreign tribunal had not been correctly declared by its judgment, or else must be taken as wrongly decided. Compare Nelson, *Private International Law*, p. 357, note (k).

<sup>3</sup> See Intro., General Principle No. I., p. 23, and pp. 25, 26, *ante*.

<sup>4</sup> L. R. 6 Q. B. 139.

<sup>5</sup> *Ibid.*, 155.

<sup>6</sup> *In re Henderson, Nouvion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 256, per Lindley, L. J.

<sup>7</sup> *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Schibsby v. Westernholz* (1870), L. R. 6 Q. B. 155.

<sup>8</sup> *Castrique v. Imrie* (1870), L. R. 4 H. L. 414.

"By the comity which is paid by us to the judgment of other Courts abroad of competent jurisdiction we give a full and binding effect to such judgments,

a judgment or sentence of divorce,<sup>1</sup> or any other judgment having reference to status.<sup>2</sup>

The difference between judgments *in personam* and judgments *in rem*, or as to status, lies not in their conclusiveness as to the matter which they decide, but in the nature of the matter which they must be taken to have decided, and as to which, therefore, alone they are conclusive. When a Court pronounces a judgment *in personam*, it decides only that *A* has a given right against *X*, *e.g.*, a right to the payment of 20*l.* by *X*: the judgment, therefore, is conclusive only as between *A* and *X*, or their representatives. When a Court, on the other hand, pronounces a judgment *in rem*, it determines the title to a thing, *e.g.*, a ship, not as between *A* and *X*, but as regards *A* against all the world. The judgment, therefore, is conclusive against the whole world.<sup>3</sup> The same remark applies in principle to a sentence of divorce, for the sentence determines that *H* and *W*, the divorced persons, are, as regards all the world, to be regarded as unmarried persons.

The principle that a foreign judgment is conclusive and unimpeachable upon its merits holds good whether the judgment be relied upon by the plaintiff or by the defendant.<sup>4</sup>

#### Illustrations.<sup>5</sup>

1. *A* obtains a foreign judgment against *X* for a debt due from *X* to *A*. The judgment is conclusive, and *X* cannot, in an action on the judgment in England, show that the debt was not really owing from *X* to *A*.<sup>6</sup>

2. *A* sues *X* in a French Court for breach of an English charter-party, in which is a clause, "penalty for the non-performance of this agreement, estimated amount of freight." The foreign

"as far as they profess to bind the persons and property immediately before them" in judgment." *Power v. Whitmore* (1815), 4 M. & S. 141, 150, judgment of Ellenborough, C. J.

<sup>1</sup> *Harvey v. Farnie* (1882), 8 App. Cas. 43.

<sup>2</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; *In re Trufort* (1887), 36 Ch. D. 600, 611.

<sup>3</sup> Compare Story, ss. 591, 592.

<sup>4</sup> *Burrows v. Jemino* (1726), 2 Str. 733; *Plummer v. Woodburne* (1825), 4 B. & C. 625; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Henderson v. Henderson* (1843), 3 Hare, 100; cf. Nelson, p. 346.

<sup>5</sup> In these illustrations it is assumed that the Court is a Court of competent jurisdiction.

<sup>6</sup> *Tarleton v. Tarleton* (1815), 4 M. & S. 20.

Court, under an erroneous view of English law, treat this clause as fixing the amount of damages recoverable, and therefore give judgment in favour of *A* for 700%, the amount of the freight. The judgment, though given under a mistaken view of English law, is conclusive.<sup>1</sup>

3. *A* brings an action in England for 200% due to *A* from *X* under a judgment of a New York Court. The judgment is founded on a mistaken view of the law of New York. The judgment is conclusive.<sup>2</sup>

4. *A* obtains a judgment for debt against *X* in a Canadian Court. *X*, at the time the action is brought in Canada, has been made bankrupt in England, and might have pleaded the bankruptcy in defence to the action. The bankruptcy is not pleaded in Canada. The Canadian judgment is conclusive.<sup>3</sup>

5. *H* is domiciled in Scotland; he marries *W*, an Englishwoman, in England. Whilst they are domiciled in Scotland, *H* obtains a divorce from *W* in a Scotch Court for a cause for which divorce could not be obtained in England. The sentence of divorce is conclusive.<sup>4</sup>

RULE 101.—A valid foreign judgment has the effects stated in Rules 102 to 108; and these effects depend upon the nature of the judgment.

#### Comment.

The validity or the conclusiveness of a foreign judgment does not necessarily involve the enforceability thereof in England. The extent to which a foreign judgment, even when valid, can be enforced, or what in other words are its effects in England, is to be determined in accordance with Rules 102 to 108.<sup>5</sup>

<sup>1</sup> *Godard v. Gray* (1870), L. R. 6 Q. B. 139. See also *Castrique v. Imrie* (1870), L. R. 4 H. L. 414.

<sup>2</sup> *Scott v. Pilkington* (1862), 2 B. & S. 11; 31 L. J. Q. B. 81. Conf. *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L. J. Ex. 238; and contrast *Meyer v. Ralli* (1876), 1 C. P. D. 358, which (*semble*) is wrongly decided.

<sup>3</sup> *Ellis v. McHenry* (1871), L. R. 6 C. P. 228.

<sup>4</sup> *Hurvey v. Farnie* (1882), 8 App. Cas. 43. Compare *Scott v. Attorney-General* (1886), 11 P. D. 128, which apparently shows that the Scotch Court would have had jurisdiction, and the sentence have been conclusive, even had the parties been domiciled in England at the time of the marriage.

<sup>5</sup> See pp. 411—427, *post*.

II. PARTICULAR KINDS OF JUDGMENTS.<sup>1</sup>(A) JUDGMENT *in Personam*.(a) *As Cause of Action*.

RULE 102.—Subject to the possible exception herein-after mentioned, a valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is

- (1) for a debt,<sup>2</sup> or definite sum of money, and
- (2) final and conclusive,<sup>3</sup>

but not otherwise.

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.<sup>4</sup>

## Comment.

There is no mode of directly enforcing a foreign judgment in England (unless it be a Scotch or Irish judgment)<sup>5</sup> by execution, but a valid foreign judgment for a debt or fixed sum of money may be enforced by an action on the part of the person in whose favour the judgment is given (generally the plaintiff in the foreign proceedings) for the sum due under the judgment.

*As to conditions of enforceability*.—The possibility of enforcing a foreign judgment by action, or of bringing (to use the technical term) “an action on the judgment,” is subject to two conditions, each of which is essential to the maintenance of the action.

<sup>1</sup> See, for authorities as to Foreign Judgments, note 1, p. 393, *ante*.

<sup>2</sup> *Sadler v. Robins* (1808), 1 Camp. 253; *Henderson v. Henderson* (1844), 6 Q. B. 288; *Nouvion v. Freeman* (1889), 15 App. Cas. 1.

<sup>3</sup> *Plummer v. Woodburne* (1825), 4 B. & C. 625; *Henley v. Soper* (1828), 8 B. & C. 16; *Paul v. Roy* (1852), 15 Beav. 433; *Patrick v. Shedden* (1853), 2 E. & B. 14; 22 L. J. Q. B. 283; *Frayes v. Worms* (1861), 10 C. B. (N. S.) 149; 2 Sm. L. C. (9th ed.), p. 882.

<sup>4</sup> *Nouvion v. Freeman* (1889), 15 App. Cas. 1, 13, language of Lord Watson; *Nouvion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 255, judgment of Lindley, L. J.; *Scott v. Pilkington* (1862), 2 B. & S. 11.

<sup>5</sup> See Rule 104, p. 419, *post*.

First, the judgment must be a judgment for a *debt*.<sup>1</sup> It must order *X*, the defendant in the English action, to pay to *A*, the plaintiff, a definite and actually ascertained<sup>2</sup> sum of money; if it orders him to do anything else, *e.g.*, specifically perform a contract, it will not support an action.

Secondly, the judgment must be "*final and conclusive*."

"There is [often] a little misapprehension as to what is meant 'by the word 'final.' We require a foreign judgment to be a 'final one, that is to say, it must not be merely what we should call here an interlocutory order, an order not purporting to decide the rights of the parties, but merely requiring something to be done pending the prosecution of the action, either for the purpose of security, or of keeping things as we say *in statu quo* until the trial of the action.'"<sup>3</sup>

The reason for this is that "to give effect . . . in this country to a . . . judgment [which is not final in the country where it is given] would enable the plaintiff to obtain in this country a greater benefit from it than he could obtain from it in [the country where it is given]. It would be entirely contrary to the principle on which English Courts proceed in enforcing a foreign judgment, if we were to adopt that course."<sup>4</sup>

The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. "In order to establish that [a 'final and conclusive] judgment has been pronounced, it must be shown that in the Court by which it was pronounced, it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties."<sup>5</sup>

"No decision has been [or can be] cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causâ cognitâ*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and

<sup>1</sup> *Henley v. Soper* (1828), 8 B. & C. 16.

<sup>2</sup> *Sadler v. Robins* (1808), 1 Camp. 253.

<sup>3</sup> *Nourion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 251, judgment of Cotton, L. J.

<sup>4</sup> *Ibid.*, 249, judgment of Cotton, L. J. Compare Intro., General Principles Nos. I. and V., pp. 23, 58, *ante*.

<sup>5</sup> *Nourion v. Freeman* (1889), 15 App. Cas. 1, 9, judgment of Lord Herschell.

“decided by the foreign tribunal, or because the defendant had “due opportunity of submitting for decision all the pleas which “he desired to state in defence.”<sup>1</sup>

*As to proviso.*—“In order to its receiving effect here, a foreign “decree need not be final in the sense that it cannot be made the “subject of appeal to a higher Court; but it must be final and “unalterable in the Court which pronounced it; and if appealable “the English Court will only enforce it, subject to conditions “which will save the interests of those who have the right of “appeal.”<sup>1</sup>

“The fact that a judgment or order may be appealed from, or “that it is made in a summary proceeding, does not prevent it “from being *res judicata* and actionable in this country.”<sup>2</sup>

“Though the pendency of an appeal in the foreign Court might “afford ground for the equitable interposition of [the English] “Court to prevent the possible abuse of its process, and on proper “terms to stay execution in the action, it could not be a bar to the “action itself.”<sup>3</sup>

### Illustrations.

1. *A* brings an action against *X* in a French Court for breach of contract, and obtains judgment for 1,000*l.* An action for 1,000*l.* is maintainable in England by *A* against *X* on the judgment.<sup>4</sup>

2. *A* recovers judgment against *X* for 1,000*l.* in a colonial Court of Equity in respect of equitable claims. Action maintainable.<sup>5</sup>

3. *A* recovers judgment in a Colonial Court against *X* for the payment of 600*l.*, the balance due on a partnership debt, and 53*l.* costs. Action maintainable.<sup>6</sup>

<sup>1</sup> *Nouvion v. Freeman* (1889), 15 App. Cas. 1, 13, judgment of Lord Watson.

<sup>2</sup> *Nouvion v. Freeman*, 37 Ch. D. 244, 255, judgment of Lindley, L. J.

<sup>3</sup> *Scott v. Pilkington* (1862), 2 B. & S. 11, 41, *per curiam*.

<sup>4</sup> See *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

The words “in England” are inserted in this first illustration to remind the reader that the illustrations refer only to proceedings in England. The words “action maintainable,” or “no action maintainable,” in the subsequent illustrations, mean that *A*, who obtains the foreign judgment, can or cannot enforce it by action in England.

<sup>5</sup> *Henderson v. Henderson* (1844), 6 Q. B. 288.

<sup>6</sup> *Henley v. Soper* (1828), 8 B. & C. 16.

4. *A* recovers judgment against *X* in a Jamaica Court, that *X* should pay *A* 3,000*l.*, after first deducting thereout *X*'s costs, to be taxed by the proper officer. The costs have not been taxed. The judgment is not a judgment for a fixed sum. No action maintainable.<sup>1</sup>

5. *A* obtains a judgment of the Scotch Court of Session against *X*, ordering *X* to pay 500*l.* to *A* on certain terms, pending an appeal by *X* to the House of Lords. It is in effect an interlocutory order for the payment of costs. No action maintainable.<sup>2</sup>

6. *A* takes certain summary or "executive" proceedings against *X* in a Spanish Court for the recovery of a debt, and obtains a so-called *remate* judgment for 10,000*l.* The judgment is final in these proceedings, subject, however, to reversal on appeal. In these executive proceedings *X* can set up certain limited defences, but cannot dispute the validity of the contract under which the debt arises. Either party, if unsuccessful in the executive proceedings, may in the same Court and in respect of the same matter take ordinary or (so-called) plenary proceedings in which all defences may be set up, and the merits of the matter may be gone into. In the plenary proceedings a *remate* judgment cannot be set up as *res judicata* or otherwise, and a plenary judgment renders the *remate* judgment inoperative. The *remate* judgment is not final and conclusive. No action maintainable on the *remate* judgment.<sup>3</sup>

7. *A*, in an action in New York, recovers judgment against *X* for 3,000*l.* *X* appeals against the judgment to the New York Court of Appeal. An appeal under the law of New York is not a stay of execution. While the appeal is pending *A* brings in England an action against *X* on the judgment for 3,000*l.* The action is maintainable.<sup>4</sup>

*Exception.*<sup>5</sup>—An action (*semble*) cannot be maintained on a valid foreign judgment if the cause of action in

<sup>1</sup> *Sadler v. Robins* (1808), 1 Camp. 253.

<sup>2</sup> *Patrick v. Shedden* (1853), 22 L. J. Q. B. 283; 2 E. & B. 14. Compare *Paul v. Roy* (1852), 15 Beav. 433; see *Plummer v. Woodburne* (1825), 4 B. & C. 625.

<sup>3</sup> *Nouvion v. Freeman* (1889), 15 App. Cas. 1.

<sup>4</sup> *Scott v. Pilkington* (1862), 2 B. & S. 11; conf. especially, p. 41, judgment of Cockburn, C. J.

<sup>5</sup> See *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Huntington v. Attrill*, [1893] A. C. 150; (1892), 146 U. S. 657; *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265; *De Brimont v. Penniman* (1873), 10 Blatch. 436; see *Freeman, Judgments*, s. 588.



respect of which the judgment was obtained was of such a character that it would not have supported an action in England (?).

### Comment.

Transactions which give rise to a right of action in a foreign country may be such that they would not support an action in England.<sup>1</sup> If, then, *A* recovers judgment in a foreign, *e.g.*, in a Belgian, Court for 100*l.* against *X* in respect to some act which would not itself support an action in England, can *A* enforce the Belgian judgment in England by means of an action? On principle this question ought to be answered in the negative, but the question has never, it would appear; come directly before our Courts, and the authorities from which a reply can be drawn are not absolutely conclusive.

### Illustrations.

1. In a penal action brought in New York by *A*, a government official, against *X*, a citizen of New York, *A* recovers judgment for 100*l.* *X* is in England. *A* brings an action against *X* on the judgment for 100*l.* The action is (*semble*) not maintainable.<sup>2</sup>

2. *X*, a Swiss, enters into a contract in France with *A*, a French subject, in regard to acts to be done in England. The contract, though valid by French law, is void by English law as being in restraint of trade and against public policy. *A* cannot maintain an action in England for any breach of the contract. *X* breaks the contract. *A* brings an action against *X* in France for the breach of contract and recovers 1,000*l.* *A* then brings an action on the French judgment for the 1,000*l.* against *X*, who is in England. *Semble*, the action is not maintainable?<sup>3</sup>

3. Under the Code Napoléon, a father-in-law is bound under

<sup>1</sup> See as to Penal Actions, Rule 40, p. 207, *ante*, and especially *Huntington v. Attrill* (1892), 146 U. S. 657. As to Torts, see Rules 177—179, *post*; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *The Halley* (1868), L. R. 2 P. C. 193.

<sup>2</sup> See *Huntington v. Attrill*, [1893] A. C. 150, where it seems assumed that if the original action had been a penal action, an action would not have been maintainable in England on the judgment given in the original action. Compare especially the language of the Supreme Court in *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265, 290, 291.

<sup>3</sup> This illustration is suggested by *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, where, however, the point does not directly arise.

certain circumstances to make an allowance to his son-in-law if in want, as long as a child of the marriage of the son-in-law with the daughter of the father-in-law is living.

*A*, a Frenchman, domiciled in France, marries in France *N*, the daughter of *X*, an Englishman, domiciled in England. While *A* and *X* are residing in France, *A* takes proceedings and obtains a judgment against *X*, his father-in-law, for the payment of an allowance under the Code Napoléon. Part of the allowance is not paid. *A* brings an action in England against *X* (who is in England) for the unpaid part of the allowance as for a debt due on the judgment. *Semble*, the action is not maintainable.<sup>1</sup>

SUB-RULE.—A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given.<sup>2</sup>

#### Comment.

The judgment of an English Court of record extinguishes the original cause of action.<sup>3</sup> If *A* in such a Court recovers judgment for 20*l.* against *X* for a breach of contract or tort, he can issue execution or bring an action against *X* on the judgment, but he cannot bring an action against *X* for the breach of contract, or the tort. A foreign judgment does not extinguish the original cause of action. If *A* recovers in a French Court judgment for 20*l.* against *X* for a debt, he may in England bring an action on the judgment, and he may also, if he chooses, bring an action for the debt.

<sup>1</sup> In the United States it has been held that such an action is not maintainable. See *De Brimont v. Penniman* (1873), 10 Blatch. 436; Wharton, s. 104 *b*.

Note that the judgment of the United States Court decides two different points. *First*, that in the United States no action was maintainable for the allowance. *Secondly*, that if no action was maintainable for the allowance, no action was maintainable on the French judgment for the portions of the allowance which were due under it.

<sup>2</sup> *Smith v. Nicolls* (1839), 5 Bing. N. C. 208; *Hall v. Odber* (1809), 11 East, 118; 10 R. R. 443; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; 20 L. J. Q. B. 284; *Kelsall v. Marshall* (1856), 1 C. B. (N. S.) 241; 26 L. J. C. P. 19; *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163. Piggott argues that this sub-rule is in principle unsound (see Piggott (2nd ed.), pp. 22—30), and there is considerable force in his arguments. But the authorities for it are too strong to be disputed anywhere but in a Court of Appeal. See Westlake, p. 332; Story (8th ed.), s. 599 *a*; Bullen & Leake (3rd ed.), p. 194.

<sup>3</sup> Leake, Law of Contracts (4th ed.), p. 110.

## Illustration.

*A*, in an action in a Victorian Court against *X* for breach of contract, recovers judgment for 100*l*. The judgment is neither wholly nor in part satisfied. *A* can bring an action in England against *X* for the breach of the contract.<sup>1</sup>

(b) *As Defence.*

RULE 103.<sup>2</sup>—A valid foreign judgment *in personam*, if it is final and conclusive<sup>3</sup> on the merits<sup>4</sup> (but not otherwise) is a good defence to an action for the same matter when either

- (1) the judgment was in favour of the defendant,<sup>5</sup>  
or,
- (2) the judgment being in favour of the plaintiff has been followed by execution or satisfaction.<sup>6</sup>

## Comment.

(1) *Judgment for Defendant.*—A foreign judgment in favour of the defendant in the foreign action is a complete answer to any proceedings here for the same matter by the plaintiff in such action, provided that the judgment be final and conclusive on the merits, but it is not an answer to an action in England if it be merely an interlocutory judgment, or a judgment which, though it decides the cause finally in the country where it is brought, does not purport to decide it on the merits, *e.g.*, if it is given in favour of the defendant on the ground that the action is barred by a statute of limitations.<sup>7</sup>

(2) *Judgment for Plaintiff.*—So, again, a foreign judgment in favour of the plaintiff which purports to be final and conclusive on the merits is, if followed by execution or satisfaction, an answer

<sup>1</sup> See cases cited in note 2, p. 416, *ante*.

<sup>2</sup> See Westlake, p. 384; Foote, pp. 572, 573.

<sup>3</sup> As to meaning of "final and conclusive," see p. 412, *ante*.

<sup>4</sup> *Harris v. Quine* (1869), L. R. 4 Q. B. 653.

<sup>5</sup> *Plummer v. Woodburne* (1825), 4 B. & C. 625; *General Steam Navigation Co. v. Gwillou* (1843), 11 M. & W. 877; *Ricardo v. Garcias* (1845), 12 Cl. & F. 368.

<sup>6</sup> *Smith v. Nicolls* (1839), 5 Bing. N. C. 208; *Barber v. Lamb* (1860), 8 C. B. (N. S.) 95; 29 L. J. C. P. 234; compare *Taylor v. Hollard*, [1902] 1 K. B. 676.

<sup>7</sup> *Harris v. Quine* (1869), L. R. 4 Q. B. 653.

to any action brought by the plaintiff, but "a judgment against the defendant in a foreign Court does not operate as a merger of the original cause of action,<sup>1</sup> and if not followed by execution or satisfaction is no defence."<sup>2</sup>

### Illustrations.

1. *A* brings an action in a Victorian Court against *X* for breach of contract. *X* denies the breach. A judgment which is final and conclusive in Victoria is given in favour of *X*. The judgment is a defence to an action in England against *X* by *A* for the same breach of contract.<sup>3</sup>

2. *A* brings an action, in the Consular Court of Constantinople, against *X* for a debt of 1,000*l.*, and recovers judgment for 45*l.* The 45*l.* are thereupon paid by *X*. *A* thereupon brings an action in England against *X* for the same debt. The judgment of the Consular Court is an answer to the action.<sup>4</sup>

3. *A* recovers judgment in England against *X* for 15,000*l.* He afterwards brings an action against *X* on the judgment in a South African Court. This Court goes into the merits of *A*'s original claim, and gives judgment in his favour, but only for 10,000*l.* *A* obtains payment of the 10,000*l.* under the judgment of the South African Court. *A* afterwards brings an action in England on the English judgment for the balance of 5,000*l.* The South African judgment is (*semble*) an answer to the action.<sup>5</sup>

4. *A* brings an action, in the Consular Court of Constantinople, against *X* for a debt of 1,000*l.*, and recovers judgment for 45*l.* and costs. *A* obtains no satisfaction for the judgment. *A* brings an action in England against *X* for the 1,000*l.* The judgment of the Consular Court, not having been satisfied, is not an answer to the action.<sup>6</sup>

5. *X*, in October, 1862, incurs a debt to *A*, in the Isle of Man. In 1866, *A* brings an action against *X* for the debt in a Manx

<sup>1</sup> See Sub-Rule, p. 416, *ante*.

<sup>2</sup> Bullen & Leake (3rd ed.), p. 627.

<sup>3</sup> See Bullen & Leake, p. 627. Compare *Plummer v. Woodburne* (1825), 4 B. & C. 615. See also *Ricardo v. Garcias* (1845), 12 Cl. & F. 368.

<sup>4</sup> *Barber v. Lamb* (1860), 8 C. B. (N. S.) 95; 29 L. J. C. P. 234.

<sup>5</sup> *Taylor v. Hollard*, [1902] 1 K. B. 676, 681, judgment of Jelf, J. *A* has in effect elected to take the foreign judgment in discharge of his whole cause of action, and cannot afterwards sue for the residue of the original judgment debt in England. Contrast Illustration No. 6.

<sup>6</sup> Compare *Barber v. Lamb* (1860), 8 C. B. (N. S.) 95.

Court. Under a Manx statute no action for the debt can be brought more than three years after the cause of action accrues, but the statute does not extinguish the debt. The Manx Court gives judgment in favour of *X* on the ground that the action is barred by the statute. The judgment is not conclusive on the merits. *A* brings an action for the debt in England. The Manx judgment is not an answer to the action.<sup>1</sup>

6. *A* recovers judgment in England against *X* for 15,000*l.* He afterwards brings an action against *X* on the judgment in a South African Court. This Court goes into the merits of *A*'s original claim, and gives judgment in his favour, but only for 10,000*l.* *A* takes no steps to realise the South African judgment, and afterwards brings an action in England on the English judgment for 15,000*l.* Whether the South African judgment is an answer to the action?<sup>2</sup>

(c) *Extension of Certain Judgments in Personam of Superior Court in one Part of United Kingdom to any other Part.*<sup>3</sup>

RULE 104.<sup>4</sup>—A judgment of a Superior Court in any

<sup>1</sup> *Harris v. Quine* (1869), L. R. 4 Q. B. 653. Compare *Frayes v. Worms* (1861), 10 C. B. (N. S.) 149.

<sup>2</sup> *Taylor v. Hollard*, [1902] 1 K. B. 676. "If the plaintiff had merely obtained judgment in the Transvaal, and finding it was for [9,000*l.* instead of 15,000*l.*] had not taken any step to realise that judgment, he could, I think, have sued afterwards in this country for the original debt." *Ibid.* p. 681, judgment of Jelf, J. But here is, perhaps, contemplated the quite different case in which there has been no judgment whatever obtained in England.

<sup>3</sup> See Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), and especially Piggott, *Foreign Judgments* (2nd ed.), pp. 358—362.

For extension of judgments of Inferior Courts, see *Inferior Courts Judgments Extension Act*, 1882 (45 & 46 Vict. c. 31); and Piggott, pp. 362, 363.

<sup>4</sup> See the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), ss. 1—4, 8. This Rule is intended simply to give the general result of the Act as regards the extension of judgments throughout the United Kingdom. It does not follow the precise words of the Act even in regard to the sections referred to. Thus, as pointed out subsequently in the comment (see p. 421), what is enforced in the country where a certificate is registered is, in strictness, not the judgment, but the certificate of the judgment. The Act, further, as it originally stood, applied in England and Ireland only to judgments of the Superior Courts of Common Law. For its extension, as regards the kind of judgments to which it applies, to every Division of the High Court in England or in Ireland, see the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 76; *Fontaine's Case* (1889), 41 Ch. D. (C. A.) 118; the Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 71. For

part of the United Kingdom for any debt, damages, or costs, has, on a certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the Court in which the certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration as aforesaid in the Court in which the certificate is registered.

The term "Superior Court" means in this Rule,

- (1) as applied to England, the High Court of Justice in England ;
- (2) as applied to Ireland, the High Court of Justice in Ireland ;
- (3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decreet) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland.<sup>1</sup>

#### Comment.

*First.* This Rule applies only to a judgment for "debt, damages, or costs." It applies, therefore, only to that kind of judgment which is enforceable by action in the Courts of the different parts of the United Kingdom.<sup>2</sup>

all details as to procedure, &c., the Judgments Extension Act, 1868, should itself be carefully consulted. See also *In re Watson*, [1893] 1 Q. B. (C. A.) 21 ; *In re Low*, [1894] 1 Ch. (C. A.) 147 ; *In re A Bankruptcy Notice*, [1898] 1 Q. B. (C. A.) 383 ; *Thompson v. Gill*, [1903] 1 K. B. (C. A.) 760.

It may also be well to note that the provisions of that Act, in so far as they regard the extension of an Irish judgment to Scotland, or of a Scotch judgment to Ireland, do not in strictness belong to the subject of this treatise.

The Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), extends the judgments of Inferior Courts, *e.g.*, County Courts or Civil Bill Courts, in one part of the United Kingdom, to other parts of the United Kingdom, by provisions analogous to those of the Judgments Extension Act, 1868. No reference to the Inferior Courts Judgments Extension Act is made in this Digest.

<sup>1</sup> "The Act shall not apply to any decret pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland." (31 & 32 Vict. c. 54, s. 8.)

<sup>2</sup> Compare Judgments Extension Act, 1868, ss. 1—3, 6, 8.

Hence, as has been laid down in a Scotch case, "equity judgments are excluded, and all judgments and decrees *ad facta præstanda*, or of the nature of prohibitions or injunction;"<sup>1</sup> and "so also [are] judgments in actions for the recovery of land, "and in probate and divorce suits,"<sup>2</sup> at any rate if the judgment in such an action or suit is a judgment for anything more than damages or costs; for if a party to one of these proceedings should, as might be the case, recover judgment as defendant only for damages or costs, there does not appear to be any reason why such a judgment, if recovered, *e.g.*, in Scotland, should not be capable of registration in England.

*Secondly.* Under this Rule a judgment obtained in one part of the United Kingdom, *e.g.*, in Ireland, can by formal proceedings, as to the details of which the reader should consult the Judgments Extension Act, 1868, be extended to and rendered effective in any other part of the United Kingdom, *e.g.*, in England.<sup>3</sup>

Though "judgments" are in the Judgments Extension Act, 1868, itself described as "registered,"<sup>4</sup> it is in strictness the "certificate" of a judgment which is registered, and it is also in strictness the certificate, not the judgment, which is given effect to as a judgment of the Court, *e.g.*, the English High Court, in which the registration takes place. The Superior Courts of the different parts of the United Kingdom have, at any rate, as far as relates to execution, full control and jurisdiction over any certificate or judgment registered in conformity with Rule 104,<sup>5</sup> and a certificate cannot be registered more than twelve months after the date of the original judgment without the leave of the Court or a judge of the Court where it is to be registered. This Court, *e.g.*,

<sup>1</sup> *Wotherspoon v. Conolly* (1871), Sc. Sess. Cas. 3rd Ser., ix. 310.

<sup>2</sup> See Piggott (2nd ed.), 359.

<sup>3</sup> 31 & 32 Vict. c. 54, s. 1.

<sup>4</sup> *Ibid.*, ss. 4, 6.

<sup>5</sup> See *Ibid.*, s. 4. "The Courts of Common Pleas at Westminster and at Dublin "and the Court of Session in Scotland shall have and exercise the same control "and jurisdiction over any judgment or decreet, and over any certificate of such "judgment or decreet, registered under this Act in such Courts respectively as "they now have and exercise over any judgment or decreet in their own Courts, "and in so far only as relates to execution under this Act."

The judgment itself is in this section treated as registered. The authority of the Courts is limited to that which they "now," *i.e.*, in 1868, have, and, lastly, it is, in so far as this enactment is concerned, given them in so far only as relates to execution.

the English High Court, has authority to prevent execution issuing under the judgment in England, and generally to exercise full control at any rate over the certificate which is the thing actually registered. The certificate, therefore, would be set aside for an irregularity appearing on the face of it;<sup>1</sup> and execution would not be allowed to issue if the Court where the certificate is registered were properly certified that a stay of execution had been granted by the Court in which the judgment had been obtained.<sup>2</sup>

*Thirdly.* The Court in which a certificate is registered under Rule 104 cannot apparently inquire into the validity of the original judgment. Thus if a judgment of the Court of Session be registered in England, the High Court in England cannot, it is submitted, set aside the certificate (as long as the judgment stands in Scotland) on the ground that the judgment was obtained by fraud. If the certificate is to be got rid of on that ground, the judgment must be impeached by proceedings in Scotland.

*Fourthly.* Rule 104 in no way negatives the right of a plaintiff who has obtained a judgment in one part of the United Kingdom, *e.g.*, Scotland, to bring an action upon it in another part, *e.g.*, England. The plaintiff, however, who brings such an action exposes himself to one, and perhaps to two, disadvantages. He cannot in general recover any costs,<sup>3</sup> and, if the view here taken of the Act is correct, he gratuitously runs the risk of having the judgment impeached for fraud and for other grounds of invalidity which are not available against a registered judgment.

*Fifthly.* A proceeding on arrestment in Scotland is a mode of asserting the jurisdiction of the Scotch Courts over a defendant who, though not in Scotland, possesses property there. The reason why a judgment obtained in such an action is not allowed to be registered<sup>4</sup> is that, as our Courts do not consider the possession of property to be a sufficient ground of jurisdiction in an action *in personam*, a judgment which depended upon the existence of such jurisdiction could not be enforced by action in England.<sup>5</sup>

<sup>1</sup> See *Part v. Scannell* (1875), Ir. R. 9 C. L. 426.

<sup>2</sup> This is specially provided for in the case of judgments of the Court of Session which it is proposed to register in the High Court of England or of Ireland (see 31 & 32 Vict. c. 54, s. 3), and there can be no doubt that if a stay of execution were granted by the English or Irish High Court where a judgment was obtained, the Court of Session on being certified thereof would not allow execution to issue in Scotland. See *Piggott*, p. 358.

<sup>3</sup> 31 & 32 Vict. c. 54, s. 6.

<sup>4</sup> *Ibid.* s. 8.

<sup>5</sup> See Rules 84 and 92, pp. 374, 393, *ante*.



Here, as elsewhere, we see that Rule 104, and the Act on which it is grounded, must be strictly confined to judgments on which an action could be brought in England.

### (B) JUDGMENT *in Rem*.

RULE 105.<sup>1</sup>—A valid foreign judgment *in rem*<sup>2</sup> in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced.

#### Comment.

A valid foreign judgment or judicial proceeding *in rem* which either directly or indirectly determines the title to a movable is conclusive against all the world.<sup>3</sup> This applies to all proceedings *in rem* against movable property within the jurisdiction of the Court pronouncing the judgment. "Whatever the Court settles "as to the right or title, or whatever disposition it makes of the "property by sale, revendication, transfer, or other act, will be "held valid in every other country, where the same question comes "directly or indirectly in judgment before any other foreign "tribunal. This is very familiarly known in the cases of proceedings *in rem*, in foreign Courts of Admiralty, whether they "are causes of prize, or of bottomry, or of salvage, or of forfeiture, ". . . over which such Courts have a rightful jurisdiction, founded "on the actual or constructive possession of the subject-matter "(*res*)."<sup>4</sup>

The real principle of a judgment *in rem* is, "that a person who "acquires a valid title by the law of any country either to a chattel "or to realty shall be deemed all over the world to be owner of "such chattel or realty. If, therefore, the Court has absolutely

<sup>1</sup> *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Hobbs v. Henning* (1865), 34 L. J. C. P. 117; (1864), 17 C. B. N. S. 791; *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. 55; (C. A.) 460; compare Rule 143, p. 519, *post*.

<sup>2</sup> As to jurisdiction in actions *in rem*, see Rule 85, p. 378, *ante*.

<sup>3</sup> See Story, ss. 592, 593.

<sup>4</sup> See Story, s. 592, cited with approval by Blackburn, J.; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428, 429.

“the disposal of the *res*, and it is in its power, as it is in the case of a judgment *in rem* in the Admiralty Court, it does not matter who is owner; all the Courts assume that the thing has been fairly litigated, that the man brought before the Court is owner, and had such an interest as entitled him to raise the contest, and that the judgment *in rem* bound the whole.”<sup>1</sup> In other words, the rule as to the effect of a judgment *in rem* is, if Rule 143 can be maintained to its full extent, merely an application of that Rule.

“In the case of *Cammell v. Sewell*,”<sup>2</sup> it has been said by a very eminent judge, “a more general principle was laid down, viz., that ‘if personal property is disposed of in a manner binding ‘according to the law of the country where it is, that disposition ‘is binding everywhere.’ This, we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* ‘is binding everywhere, is in truth but a branch of that more ‘general principle.’”<sup>3</sup>

#### Illustrations.

1. *A* brings an action *in rem* in a French Court against a British ship, the *Ann Martin*, then in the port of Havre, and claims to be the owner of the ship. *A* obtains a judgment in his favour, and is declared to be the owner of the ship. *A* has in England the rights of owner over the *Ann Martin* against all the world.<sup>4</sup>

2. *A*, an Englishman, is owner of a British ship. Whilst the ship is at Havre, a French Court, honestly exercising its jurisdiction, pronounces in a proceeding *in rem* a judgment under which the ship is ordered to be sold for the payment of debts due from *M*, and is sold to *X*, a British subject. The Court has acted under a misconception of English law, and in consequence has not recognised the rights of *A* as owner. The ship is brought by *X* to England. *X* has a good title to the ship in England.<sup>4</sup>

3. A British ship is seized as prize by a Russian vessel, on the ground of attempted breach of blockade, and taken to a Russian

<sup>1</sup> *Simpson v. Fogo* (1863), 32 L. J. (Ch.) 249, 256, judgment of Wood, V.-C.

<sup>2</sup> 5 H. & N. 728, 746.

<sup>3</sup> *Castrique v. Inrie* (1870), L. R. 4 H. L. 414, 429, per Blackburn, J.

<sup>4</sup> Compare *Castrique v. Inrie* (1870), L. R. 4 H. L. 414.

port for adjudication as prize by a prize Court. The goods on board the ship are sold under the order of the Court to *X*. It is ultimately decided by the prize Court that the ship was not lawfully captured. The title of *X*, the purchaser, to the goods is valid against that of *A*, the original owner.<sup>1</sup>

RULE 106.<sup>2</sup>—A valid foreign judgment *in rem* given by a Court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment.

#### Illustration.

*A* brings an action and obtains a judgment *in rem* in a foreign country against the City of Mecca, a British ship, then in a port of such country. The City of Mecca, the judgment not having been satisfied, comes into an English port. *A* can enforce the foreign judgment by an action *in rem* against the ship.<sup>3</sup>

### (C) JUDGMENT, OR SENTENCE, OF DIVORCE.

RULE 107.<sup>4</sup>—A valid foreign judgment, or sentence, of divorce has in England the same effect as a divorce granted by the Court.

#### Comment.

A divorce granted by a foreign Court of competent jurisdiction<sup>5</sup> has in England the same effects as an English divorce. Restrictions imposed by the foreign law on the freedom of the divorced parties, as to marriage or otherwise, which are not imposed by an

<sup>1</sup> See as to the principle of this case, *Stringer v. English, &c. Insurance Co.* (1870), L. R. 5 Q. B. 599, and especially p. 606, judgment of Martin, B.

<sup>2</sup> *The City of Mecca* (1881), 6 P. D. (C. A.) 106.

See Rule 47, p. 251, *ante*, and Williams & Bruce (3rd ed.), p. 121.

<sup>3</sup> See *The City of Mecca* (1881), 6 P. D. (C. A.) 106. In that case the Court of Appeal held that the action did not lie, but, *semble*, that the only reason for this was that the Portuguese judgment was not a judgment *in rem*. Had it (as supposed by the Court below, 5 P. D. 28) been a judgment *in rem*, then an action *in rem* might have been brought against the ship to enforce the judgment.

<sup>4</sup> *Scott v. Attorney-General* (1886), 11 P. D. 128.

<sup>5</sup> As to jurisdiction, see Rules 86, 87, pp. 381, 384, *ante*.

English divorce, are here inoperative, But in order that a foreign sentence of divorce should be treated as a divorce in England the sentence must be complete and final; the parties to the marriage must under it be actually divorced; it must not be a sentence which has not become complete, but is to become complete at some future date if certain conditions are fulfilled, *e.g.*, if no appeal is made against it within, say, six months. After these conditions are fulfilled the sentence is final, and the divorce is valid in England; but until they are fulfilled the parties are not in fact divorced; they have not acquired<sup>1</sup> the rights of unmarried persons, and they will not be treated in England as divorced.<sup>2</sup>

### Illustrations.

1. *H*, an Irishman, and *W*, an Irishwoman, marry in Ireland, where they are domiciled. They afterwards acquire a domicile in the Cape Colony. While they are there domiciled *H* is divorced from *W* by the sentence of a Cape Court on account of *W*'s adultery with *X*. The divorce is, under the law of the Cape, an absolute dissolution of the marriage, but does not allow a husband or wife divorced for adultery to re-marry whilst the injured party remains unmarried. *H* remains unmarried. *X* marries *W*, first at the Cape and afterwards in England. The marriage in England is valid.<sup>3</sup>

2. *W* and *X* are respondent and co-respondent respectively in a divorce suit in India, instituted by *H*, the husband of *W*. A decree absolute dissolving the marriage of *H* and *W* is pronounced under the Indian Divorce Act, 1869, No. IV. Section 57 of that Act provides that the petitioner or the respondent may marry again after a period of six months from the date of the decree, if no appeal has been made but not sooner. Within six months after the decree dissolving the marriage of *H* and *W*, *X* marries *W* in England. The marriage is invalid.<sup>4</sup>

<sup>1</sup> See Intro.. General Principle No. I., p. 23, *ante*.

<sup>2</sup> *Warter v. Warter* (1890), 15 P. D. 152.

<sup>3</sup> *Scott v. Attorney-General* (1886), 11 P. D. 128.

<sup>4</sup> *Warter v. Warter* (1890), 15 P. D. 152. The reason is, that *W* "was subject to the Indian law of divorce, and she could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from

## (D) JUDGMENT IN MATTERS OF SUCCESSION.

RULE 108.<sup>1</sup>—A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the Court.

## Comment.

*Immovables.*—A judgment as to the succession to immovables by the Courts of the foreign country where the immovables are situate<sup>2</sup> is, in so far as its effect can possibly demand the consideration of our judges,<sup>3</sup> binding on English Courts.

*Movables.*—When once the rights of succession to the movables (wherever situate) of a testator, or intestate, who has died domiciled in a foreign country, are determined by a Court of that country, English tribunals will follow the decision of the foreign Court.

“The rule to be extracted from [the] cases appears to be this, “that although the parties claiming to be entitled to the estate [*i.e.*, “movables] of a deceased person may not be bound to resort to the “tribunals of the country in which the deceased was domiciled, “and although the Courts of this country may be called upon to “administer the estate of a deceased person domiciled abroad, and “in such case may be bound to ascertain as best they can who, “according to the law of the domicile, are entitled to that estate, “yet where the title has been adjudicated upon by the Courts of “the domicile, such adjudication is binding upon, and must be “followed by, the Courts of this country.”<sup>4</sup>

## Illustrations.

1. *T*, a natural-born British subject, has under the Naturalization Act, 1870, become naturalized in Switzerland.\* He is at his death a Swiss citizen, but is domiciled in France. He leaves *A*, a son,

“their incapacity to contract a fresh marriage. . . . The distinction between [the “case of *Scott v. Attorney-General*] and the present is, that there the incapacity to “remarry imposed by the colonial law only attached to the guilty party. It was, “therefore, penal in its character, and as such was inoperative out of the juris- “diction under which it was inflicted.” *Warter v. Warter*, 15 P. D. at p. 155, judgment of Hannen, President. As to penal status, see chap. xix., Rule 125, p. 458, *post*.

<sup>1</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; *In re Trufort* (1887), 36 Ch. D. 600. See as to jurisdiction, Rules 85, 89, 90, pp. 378, 391, *ante*.

<sup>2</sup> See Rules 85, 89, pp. 378, 391, *ante*.

<sup>3</sup> See chap. iv., Rule 39, p. 201, *ante*.

<sup>4</sup> *In re Trufort* (1887), 36 Ch. D. 600, 611, judgment of Stirling, J. See *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301, and as to the jurisdiction of the Courts of domicile, Rule 90, p. 391, *ante*.

whose legitimacy is disputed. *T* has bequeathed all his movables by will to *X*, which, if *A* is legitimate, he has not under Swiss law a right to do. Litigation takes place in Switzerland as to the claims of *A* and *X* respectively to *T*'s movables. The Swiss Court gives judgment (though probably on an erroneous view of English law<sup>1</sup>) that *A* is legitimate and entitled to succeed to nine-tenths of *T*'s movables. According to the law of France (*lex domicilii*), the right of succession to *T* depends on *T*'s nationality, and the Swiss judgment is conclusive. *T* leaves movables in England. An action is brought in England by *A* to have the Swiss judgment enforced, *i.e.*, in effect, to have a judgment enforced which is held valid by the Courts of *T*'s domicile. The Swiss judgment is decisive, and is binding on the High Court.<sup>2</sup>

2. *T* dies domiciled in Portugal leaving an illegitimate son, *A*. The Portuguese Court gives judgment that *A* is entitled to part of *T*'s movables. *T* leaves movables in England. The judgment of the Portuguese Court is decisive, and binds the High Court when called upon to determine right of *A* to *T*'s movables in England.<sup>3</sup>

<sup>1</sup> As to mistake of law, see Rule 100, p. 407, *ante*.

<sup>2</sup> *In re Trufort* (1887), 36 Ch. D. 600. What is really enforced is at bottom the law of *T*'s domicile, and the movables are distributed in accordance with *T*'s *lex domicilii*. See Rule 183, p. 664, *post*.

<sup>3</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

CHAPTER XVIII.  
EFFECT IN ENGLAND OF  
FOREIGN BANKRUPTCY;  
FOREIGN GRANT OF ADMINISTRATION.

(A) FOREIGN BANKRUPTCY.

I. AS AN ASSIGNMENT.

*Bankruptcy in Ireland<sup>1</sup> or Scotland.<sup>2</sup>*

RULE 109.—An assignment of a bankrupt's property to the representative of his creditors<sup>3</sup>—

(1) under the Irish Bankrupt and Insolvent Act, 1857<sup>4</sup> (Irish Bankruptcy), or

(2) under the Bankruptcy (Scotland) Act, 1856<sup>5</sup> (Scotch Bankruptcy),

is, or operates as, an assignment to such representative of the bankrupt's

(i) immovables (land),

(ii) movables,

wherever situate.

Comment.

*As to immovables.*—An Irish or Scotch bankruptcy passes to the creditor's representative (conveniently described as the trustee) immovables of the bankrupt situate in any part of the British dominions. Thus it passes to the trustee lands, *e.g.*, in Ireland, Scotland, England, the Isle of Man, or Victoria. It probably also passes to the trustee immovables of the bankrupt situate in

<sup>1</sup> See the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).

• <sup>2</sup> See the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79).

<sup>3</sup> In Ireland the "assignees," in Scotland the "trustee."

<sup>4</sup> See 20 & 21 Vict. c. 60, ss. 267, 268.

<sup>5</sup> See 19 & 20 Vict. c. 79, s. 102, with which compare sect. 42.

a country, *e.g.*, Italy, which does not form part of the British dominion, but passes such immovables so far, and in so far only, as the Italian Courts recognise the title of the Irish or Scotch trustee.

*As to movables.*—An Irish or Scotch bankruptcy is an assignment to the trustee of the movables, *e.g.*, goods, of the bankrupt, situate in any part of the British dominions, and also in so far as Courts acting under the authority of the British Crown can determine the matter, of movables situate in countries not forming part of the British dominions.

Speaking generally, the statements made in the comment on Rule 68,<sup>1</sup> with regard to the extra-territorial effect of an English bankruptcy as an assignment, apply with the necessary alterations to the extra-territorial effect of an Irish or a Scotch bankruptcy as an assignment.

*Bankruptcy<sup>2</sup> in any Foreign Country, except Ireland or Scotland.*

RULE 110.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country not forming part of the United Kingdom,<sup>3</sup> is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England.

**Comment.**

No assignment of a bankrupt's property under the bankruptcy law of a foreign country, unless the bankruptcy takes place, as does a Scotch or Irish bankruptcy, under an Act of the Imperial Parliament, operates as an assignment of the bankrupt's immovables, *e.g.*, lands or houses in England, or, indeed, has any effect upon the title to them.

<sup>1</sup> See p. 329, *ante*.

<sup>2</sup> The word "bankruptcy," as applied to a foreign country, is here used in its very widest sense, and includes any proceeding, whatever its name, by which, under the authority of a Court, the property of an insolvent debtor is distributed among his creditors; a bankruptcy in this wide sense is sometimes described as any "process of divestiture and concurrence of creditors." See Goudy, *Law of Bankruptcy in Scotland* (2nd ed.), p. 631.

<sup>3</sup> For definition of "United Kingdom," see p. 68, *ante*.



It may, indeed, be laid down in broad terms that, according to the doctrine maintained by English Courts, a bankruptcy in one country has no effect as an assignment or otherwise (except, of course, where the bankruptcy takes place under an Act of Parliament) on land in another country.<sup>1</sup> But this statement is a little broader than the facts warrant. There is no reason to suppose that English Courts would decline to recognise the extra-territorial effect, as an assignment, of a bankruptcy in one country, *e.g.*, Victoria, on land of the bankrupt in another country, *e.g.*, New Zealand, which was given to a Victorian bankruptcy by the *lex situs*, *i.e.*, by an Act of the New Zealand legislature.<sup>2</sup>

RULE 111.<sup>3</sup>—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is domiciled, is, or operates as, an assignment of the movables of the bankrupt situate in England (?).

#### Comment.

The general principle of English law seems to be that bankruptcy, or any proceeding in the nature of bankruptcy, in a foreign country where the bankrupt is domiciled, is an assignment to the trustees, assignees, curators, syndics, or others, who under the law of that country are entitled to administer his property, of all his movables, or, in other words, of his chattels personal and choses in action in England,<sup>4</sup> and, it would seem, as far as English Courts can deal with the matter, of his movables situate in any other country.

Though, however, the adoption of this principle by English Courts is on the whole pretty well established, no reported case decisively determines the extent to which English judges attribute

<sup>1</sup> *Cockerell v. Dickens* (1840), 3 Moore, P. C. 98.

<sup>2</sup> Nor would such an Act in any way exceed the authority of the New Zealand Parliament.

<sup>3</sup> *Jollet v. Deponthieu* (1769), 1 H. Bl. 132 (n.); *Sill v. Worswick* (1791), 1 H. Bl. 665; *Royal Bank of Scotland v. Cuthbert Stein's Case* (1813), 1 Rose, 462; *Selkirk v. Davis* (1814), 2 Rose, 97, 291; *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 610.

<sup>4</sup> See especially, Westlake, p. 163, s. 134.

extra-territorial operation to a bankruptcy in the country where the bankrupt is domiciled.<sup>1</sup>

The effect in England of an assignment of a debtor's property, under the bankruptcy law of the country where he is domiciled, is subject to certain limitations.

*First.* The assignment has not a greater effect, extra-territorially, than it has in the country where a bankruptcy takes place. Hence it operates in England as an assignment of such movable property only as, had it been situate in the foreign country, would have passed to the representative of the creditors and formed part of the fund to be administered for their benefit.

*Secondly.* Whether property in England is to be brought under the head of movables or immovables must be determined by the law of England (*lex situs*), and no property passes under our Rule to the representative of the creditors under a foreign bankruptcy which is not considered as movables (*mobilia*) by the law of England. Thus heirlooms, title-deeds, and other things held by English law to be immovables, would not, if situate in England, pass under their owner's bankruptcy at New York to the American assignee.<sup>2</sup>

*Thirdly.* What may be the effect of a foreign bankruptcy under the law of a debtor's domicil, as an assignment of his movable property in England, is a different question from the inquiry whether the High Court has jurisdiction to make bankrupt a debtor already made bankrupt in the country where he is domiciled? That the English Courts have jurisdiction, irrespective of the debtor's domicil, in all cases where jurisdiction is given them by the Bankruptcy Act, 1883,<sup>3</sup> is certain.<sup>4</sup>

### Illustration.

Debtor domiciled at Amsterdam stopped payment there on the 18th December, 1759. On the 1st January, 1760, the proper Court at Amsterdam took cognizance of the stoppage of payment. On the 2nd he was declared bankrupt at Amsterdam, and a curator

<sup>1</sup> See *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.), 640, 644, 645, judgment of Coleridge, C. J., and pp. 648, 650, judgment of Fry, L. J.

<sup>2</sup> See chap. xxii., Rule 140, p. 497, *post*.

<sup>3</sup> See Rules 56, 57, pp. 288, 291, *ante*.

<sup>4</sup> See *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640, 643, 644, judgment of Coleridge, C. J.; Nelson, p. 170; *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.), 716; *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816.

or assignee of his property appointed. On the 20th December, 1759, *X*, a creditor of the bankrupt, made an affidavit in the Mayor's Court of London, and attached 1,200*l.* in the hands of *M*, who was indebted to the bankrupt to that amount. On the 8th March, 1760, *X* obtained judgment and issued execution against *M*, who, being unable to pay 1,200*l.*, gave *X* a note for the amount, payable in a month. On the 12th March, *A*, the Dutch assignee, claimed the 1,200*l.* It was held that *A* was entitled to the money as against *X*, the attaching creditor.<sup>1</sup>

RULE 112.<sup>2</sup>—Subject to the effect of Rule 109,<sup>3</sup> an assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is not domiciled, does not operate as an assignment of the movables of the bankrupt situate in England.

#### Comment.

This Rule is, on the whole, in harmony with the general current of English decisions, but its correctness is not absolutely free from doubt.<sup>4</sup>

#### Illustrations.

1. A debtor is made bankrupt in France, where he is not domiciled. The bankruptcy is not an assignment of his movables in England to the representative of the creditors under the French bankruptcy, nor is it a reason for staying bankruptcy proceedings against the debtor in England.<sup>5</sup>

<sup>1</sup> *Solomons v. Ross* (1764), 1 H. Bl. 131 (n.). In this case it may, I conceive, be assumed that the bankrupt was domiciled at Amsterdam. See also *Jollet v. Deponthieu* (1769), 1 H. Bl. 132 (n.).

<sup>2</sup> *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640.

<sup>3</sup> *I.e.*, the Rule as to the effect of an Irish or Scotch bankruptcy.

<sup>4</sup> See *In re Davidson's Trusts* (1873), L. R. 15 Eq. 383; *In re Lawson's Trusts*, [1896] 1 Ch. 175; and contrast *In re Blithman* (1856), L. R. 2 Eq. 23. "It is 'submitted,'" writes Mr. Foote, "that as the English bankrupt law does not require an English domicile to found its jurisdiction, so it should recognize foreign insolvencies and bankruptcies without inquiring whether the subject of them was or was not domiciled in the country where his bankruptcy or insolvency was declared." Foote, p. 327. See, generally, as to foreign bankruptcy, *In re Levy's Trusts* (1885), 30 Ch. D. 119; *In re Aylwin's Trusts* (1873), L. R. 16 Eq. 585.

<sup>5</sup> *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640.

2. A debtor domiciled in England is made bankrupt in New Zealand, where he is not domiciled, The New Zealand bankruptcy law vests all the property of a bankrupt whatsoever, and wheresoever situate, in the assignee in bankruptcy. The life interest of the debtor in a certain fund under a trust created by will is determinable on bankruptcy or alienation. It is not (*semble*) forfeited by an adjudication in bankruptcy made in New Zealand after the death of the testatrix.<sup>1</sup>

*English and Foreign Bankruptcy.*

RULE 113.<sup>2</sup>—Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules,<sup>3</sup> operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date.

Comment.

*First.* This Rule holds good when the earliest of several bankruptcies takes place within the United Kingdom.

On the 1st of January a debtor is adjudicated bankrupt in Ireland, and his property thereupon passes, or is assigned, to the Irish assignees, and this whether his property is situate in Ireland or in England. On the 2nd of January he is adjudicated bankrupt in England, and his property (if any) passes or is assigned to the English trustee,\* but it is in reality the assignment under the Irish bankruptcy which operates in England; for by the 2nd of January the immovables or movables, which were the property of the bankrupt on the 31st of December, have on the 1st of January ceased to belong to him, and been vested in the Irish assignees.

<sup>1</sup> *In re Hayward*, [1897] 1 Ch. 905, following *In re Blithman*. But contrast *In re Lawson's Trusts*, [1896] 1 Ch. 175.

<sup>2</sup> *Geddes v. Mowat* (1824), 1 Gl. & J. 414. Compare *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716; and *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816. See the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 14, as to power of Court to deal with case where receiving order has been made by Court against debtor whose estate ought to be distributed under Irish or Scotch bankruptcy law. See Baldwin (9th ed.), p. 171.

<sup>3</sup> See Rule 67, p. 328, *ante*; Rules 109—112, *ante*.

These immovables or movables, therefore, cannot on the 2nd of January pass to the English trustee as property of the bankrupt.<sup>1</sup>

*Secondly.* The Rule probably holds good where the earliest of several bankruptcies, and the assignment under it, takes place in a country beyond the limits of the United Kingdom, *e.g.*, Victoria or Prussia.

## II. AS A DISCHARGE.<sup>2</sup>

RULE 114.<sup>3</sup>—A discharge under the bankruptcy law of any country from any debt or liability is in such country a discharge from such debt or liability, wherever it has been contracted or has arisen.

### Comment.

The principle of this Rule is that a discharge from a debt under the bankruptcy law of any country is presumably intended to free him from the debt, whether incurred in that country or elsewhere.

“A foreign certificate,” says Pollock, C. B., [may be<sup>4</sup>] “no answer to a demand in our Courts; but an English certificate is surely a discharge as against all the world in the English Courts. The goods of the bankrupt all over the world are vested<sup>5</sup> in the assignees; and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here.”<sup>6</sup>

<sup>1</sup> Priority, for the purpose of this Rule, depends on the date of the assignment, and not on the date of the commission of the act of bankruptcy. See *Geddes v. Morat* (1824), 1 Gl. & J. 414. It should be noted that, as regards a Scotch bankruptcy, though it is the act and warrant of confirmation which vests the bankrupt's property in the trustee, it is then vested as at the date of the sequestration. See 19 & 20 Vict. c. 79, s. 102 and s. 42. In considering, therefore, whether an assignment under an English bankruptcy or an assignment under a Scotch bankruptcy is the earlier, the date to be looked at is the date of the adjudication (see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54) in the one case and of the sequestration in the other.

<sup>2</sup> Story, ss. 331—340; Westlake, pp. 305—308; Foote, pp. 457—463; Nelson, pp. 171, 172. See Rule 68, p. 329, *ante*.

<sup>3</sup> *Armani v. Castrique* (1844), 13 M. & W. 443, 447, dictum of Pollock, C. B.; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, 235, *per curiam*.

• Compare Rules 115—117, pp. 436—442, *post*.

<sup>5</sup> *I.e.*, as far as can be effected by English law. For the effect of an English bankruptcy as an assignment, see Rule 67, p. 328, *ante*.

<sup>6</sup> *Armani v. Castrique* (1844), 13 M. & W. 443, 447, *per* Pollock, C. B.

These words refer to the effect of a discharge under an English bankruptcy, and it is only to such a discharge that our Rule can from its nature be applied by English Courts; but the principle embodied in the Rule, and expressed in the words of Pollock, C. B., is accepted by English judges as determining the effect in a foreign country, in so far as the matter can come before them for consideration, of a discharge under a bankruptcy in such country.<sup>1</sup>

#### Illustrations.

1. X, a Frenchman, becomes indebted in France to another Frenchman, A. X becomes bankrupt and obtains his discharge in England. The discharge is in England an answer to an action for the debt by A against X.<sup>2</sup>

2. X, an Englishman, becomes indebted in England to another Englishman, A. X becomes bankrupt and obtains his discharge in Victoria. The discharge is in Victoria an answer to an action for the debt by A against X.<sup>3</sup>

RULE 115.<sup>4</sup>—A discharge from any debt or liability under the bankruptcy law of the country where the debt or liability has been contracted or has arisen [or perhaps where it is to be paid or satisfied ?] is a discharge therefrom in England.<sup>5</sup>

#### Comment.

This Rule is well established, but there is some little doubt as to its exact extent.

The discharge of a debt (including in that term any obligation to pay money arising from a contract) under the bankruptcy law of the country where the debt is incurred (*lex loci contractus*) is a valid discharge in England.

<sup>1</sup> Compare *Ellis v. M<sup>c</sup>Henry* (1871), L. R. 6 C. P. 228, 234, 235.

<sup>2</sup> *Armani v. Castrigue* (1844), 13 M. & W. 443.

<sup>3</sup> Compare *Ellis v. M<sup>c</sup>Henry* (1871), L. R. 6 C. P. 228, 234, 235.

<sup>4</sup> *Potter v. Brown* (1804), 5 East, 124; *Gardiner v. Houghton* (1862), 2 B. & S. 743; *Quelin v. Moisson* (1827), 1 Knapp, P. C. 265 (n.); *Ellis v. M<sup>c</sup>Henry* (1871), L. R. 6 C. P. 228, 234, judgment of Bovill, C. J.; *Bartley v. Hodges* (1861), 1 B. & S. 375; 30 L. J. Q. B. 352; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28; *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399.

<sup>5</sup> As all the Rules in this Digest are rules of English law, the words "in England" are not strictly necessary, but are here inserted to prevent misunderstanding.

"The rule," says Lord Ellenborough, "was well laid down by Lord Mansfield, in *Ballantine v. Golding*, that what is a discharge of a debt in the country where it was contracted is a discharge of it everywhere."<sup>1</sup>

"The rule adopted," says Cockburn, C. J., "by Lord Ellenborough, in *Potter v. Brown*,<sup>1</sup> after the case of *Ballantine v. Golding*<sup>2</sup> and *Hunter v. Potts*,<sup>3</sup> . . . applies to a discharge by a Court in a foreign country; *a fortiori*, it applies to a discharge by a Court in one of the British colonies."<sup>4</sup>

"There is no doubt," it has been laid down,<sup>5</sup> "that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. It was laid down by Lord King, in *Burrows v. Jemino*;<sup>6</sup> by Lord Mansfield, in *Ballantine v. Golding*;<sup>7</sup> by Lord Ellenborough, in *Potter v. Brown*;<sup>8</sup> by the Privy Council, in *Oudin v. Forbes*;<sup>9</sup> and in *Quelin v. Moisson*;<sup>10</sup> and by the Court of Queen's Bench in the case of *Gardiner v. Houghton*;<sup>11</sup> and by the Court of Exchequer Chamber, in the elaborate judgment delivered by my brother Willes, in *Phillips v. Eyre*."<sup>12</sup>

This principle certainly applies to a debt payable in the country where it is incurred, and probably applies to a debt incurred in one country, *e.g.*, Victoria, and payable in another, *e.g.*, England.<sup>13</sup>

<sup>1</sup> *Potter v. Brown* (1804), 5 East, 124, 130; 7 R. R. 663, 667, judgment of Ellenborough, C. J.

<sup>2</sup> Cooke, Bk. Law (8th ed.), 487.

<sup>3</sup> 4 T. R. 182.

<sup>4</sup> *Gardiner v. Houghton* (1862), 2 B. & S. 743, 748, per Cockburn, C. J.

<sup>5</sup> *Ellis v. McHenry* (1871), L. R. 6 C. P. 228, 234, judgment of Court delivered by Bovill, C. J.

<sup>6</sup> 2 Stra. 733.

<sup>7</sup> Cooke, Bk. Law, 419.

<sup>8</sup> 5 East, 124.

<sup>9</sup> Buck. 57.

<sup>10</sup> 1 Knapp, 265, 266, n.

<sup>11</sup> 2 B. & S. 743.

<sup>12</sup> L. R. 6 Q. B. 1, 28.

<sup>13</sup> Compare, however, *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 405, judgment of Esher, M. R.

The discharge of a debt under the bankruptcy law of the country where it is made payable (*lex loci solutionis*) is possibly a valid discharge in England, but this is not certain.<sup>1</sup>

The discharge from any liability which does not arise from a contract, *e.g.*, liability to pay damages for a tort, under the bankruptcy law of the country where the liability has arisen (*lex loci delicti commissi*) is a valid discharge in England.<sup>2</sup>

A discharge, be it noted, cannot have a greater extra-territorial effect than it has under the law of the country where it is obtained. A bankruptcy, *e.g.*, in Victoria, will in no case free a debtor in England from any liability from which he is not discharged under the Victorian bankruptcy law; nor, conversely, will an English bankruptcy free him in Victoria from any debt from which he is not discharged under the English Bankruptcy Act.<sup>3</sup>

A discharge, again, under the law of a foreign country, will not operate in England unless it is an extinction of the debt or liability; if, in the country where it is obtained, it interferes merely with the remedies or the procedure for enforcing the bankrupt's liabilities, it will not be a discharge in England.<sup>4</sup>

### Illustrations.

1. *X* incurs a debt to *A* in Victoria for goods there sold and delivered by *A* to *X*. Afterwards *X* obtains a discharge under the Victorian insolvency law. The discharge is an answer to an action for the debt in England.<sup>5</sup>

2. A bill is drawn in one of the United States by *X* in favour of *A* on a person in England. It is dishonoured by non-acceptance. The drawer is discharged in America under the bankruptcy law there in force. The discharge is valid in England.<sup>6</sup>

<sup>1</sup> Compare *Gardiner v. Houghton* (1862), 2 B. & S. 743, 745, language of Blackburn, J., and *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, judgment of Bovill, C. J., with *Potter v. Brown* (1804), 5 East, 124, 130, judgment of Ellenborough, C. J., and *Gardiner v. Houghton*, 2 B. & S. 743, 748, judgment of Cockburn, C. J.

<sup>2</sup> See *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28, compared with *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, and Westlake, pp. 305, 306.

<sup>3</sup> For such debts, see Bankruptcy Act, 1883, s. 30.

<sup>4</sup> See *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 238; and Story, s. 338.

<sup>5</sup> *Gardiner v. Houghton* (1862), 2 B. & S. 743; *Quelin v. Moisson* (1827), 1 Knapp, P. C. 265 (n.); *Smith v. Buchanan* (1800), 1 East, 6; *Potter v. Brown* (1804), 5 East, 124.

<sup>6</sup> *Potter v. Brown* (1804), 5 East, 124. Compare *Symons v. May* (1851), 6 Ex. 707; 20 L. J. Ex. 414; compare, also, Chalmers, Bills of Exchange (6th ed.), pp. 245, 246.



3. *X* enters in England into a contract with *A* to pay him 100*l*. The debt is made payable in Victoria and not elsewhere. *X* is made bankrupt in Victoria and obtains a discharge from the debt. The discharge (*semble*) is valid in England.<sup>1</sup>

RULE 116.<sup>2</sup>—Subject to Rule 117, the discharge from any debt or liability under the bankruptcy law of a foreign country where such debt or liability has neither—

(1) been contracted or has arisen, nor

(2) is to be paid or satisfied,

is not a discharge therefrom in England.

#### Comment.

“As a general proposition, it is . . . true that the discharge of a debt or liability, by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country.”<sup>3</sup>

“The general rule,” says Lord Esher, “as to the law which governs a contract, is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract, not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. . . . The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be

<sup>1</sup> See note 4, p. 436, *ante*.

<sup>2</sup> *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234; *Smith v. Buchanan* (1800), 1 East, 6; *Lewis v. Owen* (1821), 4 B. & Ald. 654; *Phillips v. Allan* (1828), 8 B. & C. 477; *Bartley v. Hodges* (1861), 1 B. & S. 375; 30 L. J. Q. B. 352.

A “release in the foreign country could not *per se* get rid of a cause of action arising out of a contract to be performed in this country.” *Taylor v. Holland*, [1902] 1 K. B. 676, 682, judgment of Jelf, J., citing Rule 116 with approval. The language of Jelf, J., goes a little beyond the rule, but the cause of action or liability in the particular case both arose and was to be satisfied in England.

<sup>3</sup> *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, judgment of Bovill, C. J. Compare *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 406, judgment of Esher, M. R.

“such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled, the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country, by which they have not agreed to be bound.”<sup>1</sup>

The effect, then, of Rules 115, 116, is, that the validity in England of the discharge from a contract under the bankruptcy law of a foreign country depends (in so far as the case does not fall within Rule 117), as does the validity of every other discharge, on its being a discharge under the proper law of the contract.<sup>2</sup> But it should be borne in mind that, in determining the extra-territorial effect of a discharge in bankruptcy, the Courts appear to be specially ready to assume that the law of a country where a contract is made (*lex loci contractus*) is the proper law of the contract, and very probably hold that a discharge under the bankruptcy law of the country where a contract is made is valid everywhere, even though the contract be performable in another country.<sup>3</sup>

<sup>1</sup> *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 405, 406, judgment of Esher, M. R.

<sup>2</sup> As to meaning of “proper law of the contract,” see Rule 146, p. 529, *post*; as to discharge, see Rule 153, p. 569, *post*.

<sup>3</sup> The bankrupt’s domicile has no bearing on the extra-territorial effect of a discharge. See *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, compared with *Gardiner v. Houghton* (1862), 2 B. & S. 743.

## Illustrations.

1. *X*, a Frenchman domiciled in France, makes a contract with *A*, an Englishman, for the purchase of copper. The copper is, under the contract, to be delivered by *A* to *X* at Liverpool, and *X* is to pay for it in London. The contract, moreover, is made subject to the rules of the London Metal Exchange. *X* makes default in accepting the copper, and afterwards obtains in France from a French Court a discharge in bankruptcy or liquidation. Such a discharge frees *X* under French law from liability for the breach of the contract. *A* brings an action against *X* in England for breach of contract. The discharge under the French bankruptcy is not an answer to the action, *i.e.*, it is not a valid discharge.<sup>1</sup>

2. *A* draws, and *X* accepts, a bill in England, and *X* also borrows money from and states accounts with *A* in England. *X* after this becomes bankrupt in Victoria, and obtains his discharge under the Victorian bankruptcy laws. *A* brings an action in England against *X* on the bill for money lent and on the accounts stated. The discharge in Victoria is not a defence to the action, *i.e.*, it is not a valid discharge.<sup>2</sup>

RULE 117.<sup>3</sup>—A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under—

- (1) an English bankruptcy,<sup>4</sup>
- (2) an Irish bankruptcy,<sup>5</sup>
- (3) a Scotch bankruptcy,<sup>6</sup>

is, in any country forming part of the British dominions,

<sup>1</sup> *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399.

<sup>2</sup> *Bartley v. Hodges* (1861), 1 B. & S. 375.

<sup>3</sup> Westlake, pp. 306—308; Foote, p. 459; Piggott, pp. 340—344; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Gill v. Barron* (1868), L. R. 2 P. C. 157, 175, 176; *Ferguson v. Spencer* (1840), 2 Scott, N. R. 229; 1 M. & G. 987; *Edwards v. Ronald* (1830), 1 Knapp, 259; *Sidaway v. Hay* (1824), 3 B. & C. 12; *Philpotts v. Reed* (1819), 1 Br. & Bing. 294. This case, which is cited and commented upon, Piggott, p. 344, is specially instructive, as the discharge, though directly under an Imperial Act of Parliament, was a colonial discharge. But Rule 117 does not apply to a discharge under a winding-up order within the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104).

<sup>4</sup> *I.e.*, under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See Rule 69, p. 389, *ante*.

<sup>5</sup> *I.e.*, under the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).

<sup>6</sup> *I.e.*, under the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79). See especially, sects. 140, 147, 148.

a discharge from such debt or liability, wherever, or under whatever law, the same has been contracted or has arisen.

### Comment.

An Act of the Imperial Parliament discharging a debtor from a debt takes effect throughout the whole of the Crown's dominions, and a discharge under such an Act is valid in every part of the British Empire, and this irrespective of the question where it is that the debt or other liability has arisen, or what may be the proper law of the contract under which it has been incurred.<sup>1</sup> A discharge, therefore, under the English Bankruptcy Act, 1883, is a valid discharge, *e.g.*, in Scotland or in Victoria, of debts or liabilities incurred, whether in Scotland, or in Victoria, or elsewhere; whilst a discharge under the Scotch Bankruptcy Act,<sup>2</sup> or under the Irish Bankruptcy Act, is a valid discharge, *e.g.*, in England or in Victoria, of debts or liabilities wherever incurred.

"An adjudication in bankruptcy, followed by a certificate or discharge in this country under the bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world, and it would have the effect of putting an end to any claims in the island of Barbadoes, or elsewhere, to which the [bankrupt] might have been liable at the date of the adjudication."<sup>3</sup>

Rule 117, combined with Rule 116, leads to the result that a discharge under an English Bankruptcy Act is, in Victoria, a discharge from a debt contracted in Victoria or elsewhere, whilst a discharge under a Victorian Bankruptcy Act is not in England a discharge from a debt or liability not arising in Victoria.<sup>4</sup>

<sup>1</sup> *Ellis v. McHenry* (1871), L. R. 6 C. P. 228, 234—236; *Sidaway v. Hay* (1824), 3 B. & C. 12; *Ferguson v. Spencer* (1840), 1 M. & G. 987; *Simpson v. Mirabita* (1869), L. R. 4 Q. B. 257.

<sup>2</sup> The Scotch Bankruptcy Act, 1856, ss. 140, 147, 148, specially provides that a discharge under the Act shall have effect throughout the dominions of the Crown. Goudy (2nd ed.), p. 638. The English and Irish Bankruptcy Acts do not contain a similar provision, but the effect of a discharge under either of them is none the less extensive.

<sup>3</sup> *Gill v. Barron* (1868), L. R. 2 P. C. 157, 175, 176, *per curiam*. See *Ellis v. McHenry* (1871), L. R. 6 C. P. 228, 234, 235.

<sup>4</sup> See for explanation of doctrine on which Rules 114 to 117 (pp. 435—442, *ante*) are based, App., Note 15, "Theoretical Basis of the Rules as to the extra-territorial effect of a Discharge in Bankruptcy."

*Question 1.—Is the discharge under the bankruptcy law of a foreign country impeachable in England on the ground that the Courts of the foreign country had no jurisdiction to make the debtor a bankrupt?*

The reply must, it is submitted, be in the negative.

If the bankruptcy takes place in Ireland or Scotland, it is extremely doubtful whether an English Court can question the jurisdiction of the Irish or Scotch Bankruptcy Court.<sup>1</sup>

If the bankruptcy takes place in a country outside the United Kingdom, *e.g.*, in Victoria or New York, then, if the discharge operates in England at all, the debtor has as a fact been relieved from liability to pay his debt under the proper law of the contract, *i.e.*, speaking generally, under the law of the country where the contract was made, and, this being so, the discharge ought to be operative in England independently of the jurisdiction of the foreign Court to make the debtor a bankrupt.

*Question 2.—Can a discharge under the bankruptcy law of a foreign country be impeached in England for fraud?*

The answer apparently is that it can. The grounds on which a foreign judgment, even when given by a Court of competent jurisdiction, is impeachable for fraud<sup>2</sup> seem equally applicable to a discharge in bankruptcy.

#### (B) FOREIGN GRANT OF ADMINISTRATION.

RULE 118.<sup>3</sup>—A grant of administration or other authority to represent a deceased person under the law of a foreign country, has no operation in England.

This Rule must be read subject to the effect of Rules 122 to 124.

#### Comment.

A foreign representative of the deceased who wishes to represent him in England must obtain a grant of administration here, and cannot in general be sued here in his character of foreign personal

<sup>1</sup> See p. 336, *ante*, as to the analogous question, whether any Court in the British dominions can question the jurisdiction of an English Bankruptcy Court.

<sup>2</sup> See pp. 397—402, *ante*.

<sup>3</sup> See Story, s. 513; Foote (3rd ed.), pp. 285, 286; Williams, *Executors* (10th ed.), pp. 339, 340; *Carter and Crost's Case* (1585), Godb. 33; *Tourton v. Flower* (1785), 3 P. Will. 368, 370; *Bond v. Graham* (1842), 1 Hare, 482; *New York Bruceries Co., Ltd. v. Att.-Gen.*, [1899] A. C. 62.

representative.<sup>1</sup> Our Rule is, in short, an application of the general principle that no person will be recognised by English Courts as personal representative of the deceased unless and until he has obtained an English grant of probate or letters of administration.<sup>2</sup>

### Illustrations.

1. An Englishman dies intestate domiciled in New York, leaving goods there. A takes out administration in New York. X, in England, owes a debt to the deceased. A cannot bring an action in England against X until he has obtained an English grant of administration.<sup>3</sup>

2. An Englishman dies in 1846 at Geneva, where his will is proved. A is X's personal representative under the law of Geneva. A sum of 34*l.* is due to the deceased, and has been paid into Court. A has not taken out probate in England. He applies for payment of the 34*l.* Payment is refused.<sup>4</sup>

RULE 119.<sup>5</sup>—Where a person dies domiciled in a foreign country, leaving movables in England, the Court will (in general) make a grant<sup>6</sup> to his personal representative under the law of such foreign country.

### Comment.

A foreign personal representative has, as such, no authority in England; but our Courts recognise the primary, though certainly

<sup>1</sup> As to this, see Rule 121, p. 451, *post*.

<sup>2</sup> See as to executor *de son tort*, Walker & Elgood, ch. xxviii. Note especially that an executor derives an inchoate right from the will, and in some respects can rightfully act as personal representative, *e g.*, commence an action, before he has obtained probate. See also *Rogers v. Frank* (1827), 1 Y. & J. 409, 414, judgment of Alexander, C. B.

<sup>3</sup> *Carter and Crost's Case* (1585), Godb. 33; *Tourton v. Flower* (1735), 3 P. Will. 368.

<sup>4</sup> *Lasseur v. Tyreconel* (1846), 10 Beav. 28.

<sup>5</sup> 1 Williams, Executors (10th ed.), pp. 338, 339; Walker & Elgood, pp. 35, 36; Westlake (4th ed.), pp. 105—108; Foote, p. 281; Nelson, pp. 207, 208, 210; *Re Bianchi* (1859), 1 Sw. & Tr. 511; *In Goods of Earl* (1867), L. R. 1 P. & D. 450; *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24; *In Goods of Smith* (1868), 16 W. R. 1130; *In Goods of Hill* (1870), L. R. 2 P. & D. 89; *In Goods of Prince Oldenburg* (1884), 9 P. D. 234; *In Goods of Dost Aly Khan* (1880), 6 P. D. 6. Conf. *In Goods of Whitelegg*, [1899] P. 267.

<sup>6</sup> See, for meaning of "grant," Rule 62, p. 303, *ante*.

not the exclusive,<sup>1</sup> jurisdiction of the Courts of a deceased person's domicile to administer his movable property, and to determine who is the person entitled to deal with such property.<sup>2</sup> When, therefore, any person, under whatever name, is appointed by the Courts of the domicile to represent the deceased, such representative has, as a rule, a claim,<sup>3</sup> though not an absolute right, to an English grant, and such grant will usually be made to him by the Court, which will moreover, in general, follow the foreign grant so as to give the foreign personal representative no more than such powers as are required for the performance by him in England of the duties imposed upon him under the law of the deceased person's domicile.<sup>4</sup>

It may happen that under the law of the foreign domicile no person is appointed by any Court to represent the deceased. In this case that person will be treated as his representative who has, under the law of the foreign country, a right, *e.g.*, as heir or universal successor, to deal with the property of the deceased.<sup>5</sup>

The Court, however, may in its discretion decline to grant administration to the foreign personal representative of the deceased if there be any reason for the refusal.

"The result of the cases is, that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (as *In the Goods of H. R. H. the Duchess d'Orléans*)<sup>6</sup> have militated against the rule of following the foreign grant,"<sup>7</sup> and the Court, whilst in general granting administration to a foreign representative appointed by the Court of the deceased's domicile, will constantly

<sup>1</sup> See *Enoch v. Wylie* (1862), 10 H. L. C. 1; and contrast pp. 13—16, language of Westbury, C., with p. 19, language of Lord Cranworth; and pp. 23, 24, language of Lord Chelmsford; and *In re Trufort* (1887), 36 Ch. D. 600, 611, judgment of Stirling, J.

<sup>2</sup> *Ibid.*; and compare *In Goods of Briesemann*, [1894] P. 260; *In Goods of Earl* (1867), L. R. 1 P. & D. 450; *In Goods of Lemme*, [1892] P. 89; *In Goods of Von Linden*, [1896] P. 148; *In Goods of Moffatt*, [1900] P. 152.

<sup>3</sup> *In Goods of Earl* (1867), L. R. 1 P. & D. 450; *In Goods of Hull* (1870), L. R. 2 P. & D. 89.

<sup>4</sup> *In Goods of Earl* (1867), L. R. 1 P. & D. 450, 453, judgment of Sir J. P. Wilde; *In Goods of Smith* (1868), 16 W. R. 1130; *In Goods of Briesemann*, [1894] P. 260, 261.

<sup>5</sup> *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24.

<sup>6</sup> (1859), 1 Sw. & Tr. 253; 28 L. J. P. & M. 129.

<sup>7</sup> *In Goods of Earl* (1867), L. R. 1 P. & D. 450, 452, judgment of Sir J. P. Wilde. Compare *In Goods of Weaver* (1866), 36 L. J. P. & M. 41.

vary the form of the grant if a variation is needed by the requirements of English law.<sup>1</sup>

The Court will generally, in cases falling within Rule 119, make a grant to the personal representative of the deceased. But the reason for making this grant to such personal representative is the fairness and expediency of allowing him to deal with all the movable property of the deceased, the beneficial succession to which is governed by the law of the deceased's foreign domicile. This reason does not apply to English immovables, the beneficial succession to which is governed by the law of England. There is, therefore (it is submitted), a possibility that the Land Transfer Act, 1897, which for the first time vests the English real estate of a deceased person in his personal representative, may, under some circumstances, afford good ground for not making a grant to the representative of a deceased person who has died domiciled in a foreign country.

#### Illustrations.

1. *T* dies domiciled in the Mauritius, leaving a will and codicil signed but not witnessed. Probate is granted in the Mauritius to *A*. The Court makes a grant to *A*.<sup>2</sup>

2. *N* dies domiciled in Brazil intestate. *P* is appointed by a Brazilian Court guardian of *N*'s children. *P* appoints *Q*, the Brazilian Minister at Turin, his attorney in the matter, with power of substitution, and issues letters of request to judicial authorities in England to deliver property of deceased to *Q* or his representative. *Q* appoints *A*, resident in England, his substitute. The Court makes a grant to *A*.<sup>3</sup>

3. *T*, an Englishman, dies domiciled in France. He appoints under his will an *exécuteur testamentaire*. It is determined by a French Court that the time limited by French law for the execution of such executorship has passed; that such executor has no longer a right to intermeddle in *T*'s estate; and that *A* and *B*, the parties

<sup>1</sup> See *In Goods of Cosnahan* (1866), L. R. 1 P. & D. 183. Under 24 & 25 Vict. c. 121, s. 4, treaty arrangements may be made with any foreign State so that the consul of such State may, in the absence of any person entitled to administration, be able to administer the personal property of subjects thereof dying in His Majesty's dominions.

<sup>2</sup> *In Goods of Smith* (1850), 2 Rob. Ecc. Rep. 332. See *In Goods of Mackenzie* (1856), Deane & Sw. 17.

<sup>3</sup> *Re Bianchi* (1859), 1 Sw. & Tr. 511.



beneficially entitled, are the only persons who have a right to intermeddle. The executor applies for an English grant. The Court refuses to make a grant to the executor, and grants administration to *A* and *B*.<sup>1</sup>

4. *T* is a British subject who dies domiciled in France. At the time of his death he possesses in France both movables and immovables. He possesses in England 500*l.*, lying at a bank, and real property of great value. He has executed a will leaving the whole of his property to a stranger, *A*. The will is in a form which is valid by the law of France, but, being unattested, is, though valid as to the 500*l.* lying in the English bank, invalid as to *T*'s real property in England.<sup>2</sup> The Court would (*semble*) make a grant to *T*'s heir, and not to *A*.

5. *T* dies domiciled in France. *A*, a French citizen, also domiciled in France, is under French law entitled to represent *T*, and to the possession of *T*'s property. *A* is, according to English law, a minor. *A* applies for a grant of administration, with the will annexed, of the goods of *T* in England. The grant is refused, on the ground that in England a grant cannot be made to a minor.<sup>3</sup>

RULE 120.<sup>4</sup>—A foreign personal representative has (*semble*) a good title in England to any movables of the deceased which—

- (1) if they are movables which can be touched, *i.e.*, goods, he has in any foreign country acquired a good title to under the *lex situs*<sup>5</sup> [and has reduced into possession (?)];
- (2) if they are movables which cannot be touched, *i.e.*, debts or other choses in action, he has in

<sup>1</sup> *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24.

<sup>2</sup> See chap. xxx., Rule 185, and Exception 1, *post*.

<sup>3</sup> *In Goods of Duchess d'Orléans* (1859), 1 Sw. & Tr. 253; 28 L. J. P. & M. 129.

<sup>4</sup> See chap. xxiv., Rule 143, p. 519, *post*, and cases cited in note thereto. Compare Westlake (4th ed.), p. 119, and Story, s. 516, with Foote, pp. 290, 291. And see *Currie v. Bircham* (1822), 1 D. & R. 35; *Jauncey v. Sealey* (1686), 1 Vern. 397; *Vanquelin v. Bourard* (1863), 15 C. B. (N. S.) 341; 33 L. J. C. P. 78; contrast *Whyte v. Rose* (1842), 3 Q. B. 493, 506. See Rule 74, p. 345, *ante*. With this Rule should be read Rule 121, p. 451, *post*.

<sup>5</sup> For meaning of *lex situs*, see pp. 69, 78, *ante*.

a foreign country acquired a good title to under the *lex situs*, and has reduced into possession.<sup>1</sup>

### Comment.

This Rule, and especially clause (1), rests on but slight authority. It is, however, supported by writers of weight, and is in the main a deduction from the principle contained in Rules 143 and 144.<sup>2</sup>

(1) *As to goods*.—"The corporeal chattels [goods] of a deceased person belong," writes Westlake, "to the heir or administrator who first reduces them into possession within the territory from the law or jurisdiction of which he derives his title or his grant."<sup>3</sup>

"If a foreign administrator," writes Story, "has, in virtue of his administration, reduced the personal property of the deceased there situated [*i.e.*, situated in a foreign country] into his own possession, so that he has acquired the legal title thereto according to the laws of that country; if that property should afterwards be found in another country, or be carried away and converted there against his will,—he may maintain a suit for it there in his own name and right personally, without taking out new letters of administration; for he is, to all intents and purposes, the legal owner thereof, although he is so in the character of trustee for other persons. . . . The plain reason . . . is, that the executor . . . [has] . . . in his own right become full and perfect legal [owner] of the property by the local law;

<sup>1</sup> *In re Macnicol* (1874), L. R. 19 Eq. 81.

<sup>2</sup> See chap. xxiv., pp. 519, 522, *post*. Compare Rule 74, p. 345, *ante*.

<sup>3</sup> Westlake (4th ed.), p. 119. He supports his view on the following three dicta from *Whyte v. Rose* (1842), 3 Q. B. 493:—(i) "If property came to England after the death, would the foreign administration give a right to it?" *Ibid.*, p. 506, per Rolfe, B. (ii) "Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?" *Ibid.*, per Parke, B. (iii) "It seems to me that your argument goes too far, and would show that no administration in England could give a right over goods anywhere out of England. A man may sue here in his own right, naming himself as executor or administrator under a foreign probate or grant; but does a man ever sue here in the character of executor or administrator under such a probate or grant?" *Ibid.*, 504, 505, per Abinger, C. B. These dicta are extremely vague, and, even if they can be so interpreted as to support Westlake's view, they were delivered at a time when less deference was paid than at present to a title acquired under the *lex situs*.

"and a title to personal property, duly acquired by the *lex loci rei sitæ*, will be deemed valid, and be respected as a lawful and "perfect title in every other country."<sup>1</sup>

This reason, obviously the right one, forcibly suggests that our Rule should be more broadly stated, and that a foreign personal representative who has in a foreign country acquired a title to goods in accordance with the *lex situs* has the rights of an owner in England, even in the rare cases where he has acquired a title to without obtaining possession of the goods.<sup>2</sup>

(2) *As to debts.*—The *situs* of a chose in action being always more or less of a fiction,<sup>3</sup> a debt may well for our present purpose be considered situate at the place where it is reduced into possession, *e.g.*, by payment, or by the obtaining of judgment for it; whence it would naturally follow that the personal representative who has thus reduced it into possession has a title to it in England or elsewhere.<sup>4</sup> The question, however, whether a debt has or has not been duly reduced into possession by a judgment depends on the answer to the inquiry whether the judgment has been given by a "Court of competent jurisdiction," in the sense in which that term is used in these Rules.<sup>5</sup> If this question be answered in the negative, the judgment has no effect in England.<sup>6</sup>

*Question 1.—What is the position of a foreign personal representative who receives payment of debts in England?*<sup>7</sup>

He is apparently in the position of an executor *de son tort*; he has no right to collect debts due to the deceased in England, he cannot (*semble*) retain the money paid him against an English administrator nor give a discharge for the debt.

*Question 2.—Is payment by a debtor to a foreign personal representative a discharge from the debt in England as against the English administrator?*<sup>8</sup>

(1) Such a payment, when made in England, can hardly (it

<sup>1</sup> Story, s. 516. The words omitted refer to the analogous case of a legatee.

<sup>2</sup> So apparently Foote (3rd ed.), p. 290. It should be noted that negotiable instruments payable to bearer are to be considered as goods, and come within clause (1) of our Rule. See Story, s. 517, and Westlake (4th ed.), p. 120.

<sup>3</sup> See pp. 309—312, *ante*.

<sup>4</sup> *In re Maenichol* (1874), L. R. 19 Eq. 81; *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341.

<sup>5</sup> See p. 354, *ante*.

<sup>6</sup> See Rule 92, p. 393, *ante*.

<sup>7</sup> Story, s. 514; Foote, p. 292.

<sup>8</sup> Compare Story, ss. 514—515 *a*, and especially, s. 515, note 3. See also Foote, p. 293.

would seem) be a discharge. The debtor is under no compulsion to pay the foreign administrator who cannot as such sue for the debt, but the debtor from the mere fact of being in England is liable at any moment to be sued by the English administrator.

(2) The effect of such a payment when made in a foreign country would seem to depend mainly upon the *situs* of the debt,<sup>1</sup> or in other words upon the place where the debt is most properly recoverable. If a debtor of a deceased person dying domiciled in New York, who is himself resident in New York, pays the debt to the New York administrator, such payment would, it is submitted, be a discharge from the debt in England as against any claim of the English administrator, and the same result would probably follow if the debtor making the payment is resident in New York, even though the deceased died domiciled in England. If, on the other hand, a debtor habitually resident in England, indebted to a deceased person dying domiciled in England, were in New York voluntarily to pay the debt to the New York administrator, the payment would not (*semble*) be a discharge as against the English administrator, and the same remark would perhaps hold good even though the deceased creditor died domiciled in New York.<sup>2</sup>

### Illustrations.

1. Deceased has died leaving goods in New York. *A* is his administrator under the law of New York. *A* takes possession as administrator of goods of the deceased. The goods are taken to England. *A* is the owner of the goods, and can bring an action in England against *X* who converts them.

2. Deceased has died leaving goods in New York. After *A* has taken out administration in New York, but before *A* has obtained possession of the goods, *X* takes them without *A*'s authority to England, where *B* has obtained a grant of administration as personal representative of the deceased. Whether *A* is in England

<sup>1</sup> Compare *Daniel v. Luker* (1571), Dyer, 305 *a*; *Whyte v. Rose* (1842), 3 Q. B. 493; *Huthwaite v. Phaire* (1840), 1 M. & G. 159. These cases, though not decisive, certainly suggest that the *situs* of the debt is the matter to be mainly considered.

<sup>2</sup> This point is very doubtful. Compare Story, s. 15, note 3. If the payment were made in New York under compulsion, *i.e.*, in consequence of an action, the effect of the payment as a discharge might perhaps depend on whether the debtor had or had not pleaded before the New York Court that the debt was due to the English administrator.

owner of the goods, and whether he can bring there an action of trover against *X*?<sup>1</sup>

3. Deceased has died intestate in India, where *A* takes out letters of administration. *A* sends proceeds of deceased's effects to *X*, her agent in England. *B*, the English administrator, cannot bring an action against *X* for the money of the intestate received by him, *i.e.*, it is money belonging to *A*.<sup>2</sup>

4. *A*, the Indian administrator of *N*, obtains in India a judgment against *X* for 5,000*l.* due to *N*. *A* can bring an action against *X* in England in *A*'s own name without taking out a grant of administration in England, *i.e.*, the debt having been reduced into possession, *A* has a good title to it.<sup>3</sup>

RULE 121.<sup>4</sup>—A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

(1) if the foreign personal representative sends or brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England;<sup>5</sup>

(2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England.<sup>6</sup>

<sup>1</sup> See pp. 448—449, *ante*.

<sup>2</sup> *Currie v. Birchan* (1822), 1 D. & R. 35.

<sup>3</sup> *In re Macnichol* (1874), L. R. 19 Eq. 81.

<sup>4</sup> Story, s. 513; *Beavan v. Hastings* (1856), 2 K. & J. 724.

<sup>5</sup> See, especially, Westlake, p. 122, s. 99. See also *Lowe v. Fairlie* (1817), 2 Mad. 101; *Logan v. Fairlie* (1825), 2 S. & St. 284, 291, judgment of Leach, V.-C.; *Sandilands v. Innes* (1829), 3 Sim. 263, 264, judgment of Leach, V.-C.; *Bond v. Graham* (1842), 1 Hare, 482. Contrast *Arthur v. Hughes* (1841), 4 Beav. 506.

<sup>6</sup> See Westlake, p. 123; *Anderson v. Caunter* (1833), 2 My. & K. 763; *Twyford v. Trail* (1834), 7 Sim. 92.

## Comment.

"It has . . . become a general doctrine of the common law, "recognised both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator [or other foreign personal representative] in his official capacity, in the Courts of any other country, except that from which he derives his authority to act in virtue of the probate and letters of administration there granted to him."<sup>1</sup> The English authorities "fully establish the doctrine that, if a foreign executor or administrator [or other personal representative] brings or transmits property here, which he has received under the administration abroad, or if he is personally present, he is not either personally, or in his representative capacity, liable to a suit here; nor is such property liable here to creditors; but they must resort for satisfaction to the forum of the original administration."<sup>2</sup>

These statements must, however, be taken subject to the provisos of Rule 121, which amount in substance to this: that though a foreign administrator or other personal representative cannot in England be made liable for property held, or acts done by him in his character of foreign administrator, yet he may by his conduct place himself in some position in which he, speaking broadly, as a trustee, or possibly as a debtor,<sup>3</sup> incurs legal liabilities which can be enforced in England.<sup>4</sup>

## Illustrations.

1. *T* dies leaving property in Italy. *X* is in Italy his personal representative. *A* is his English administrator. *A* cannot maintain an action against *X* as personal representative of *T*, *e.g.*, to obtain discovery of *T*'s personal estate.<sup>5</sup>

2. *X* is *T*'s administrator under an Indian grant of administration. *X* comes to England bringing with him personal property of *T*'s which is still unappropriated, and part of *T*'s estate. *A*,

<sup>1</sup> Story, s. 513. Or otherwise. The foreign personal representative need not be in strictness an executor or administrator.

<sup>2</sup> *Ibid.*, s. 514 *b*. But see *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34.

<sup>3</sup> See Illustrations 2—4.

<sup>4</sup> Note also the effect of Rule 65, p. 318, *ante*; and Rule 72, p. 343, *ante*.

<sup>5</sup> *Jauncy v. Sealey* (1686), 1 Vern. 397.

*T*'s English administrator, can bring an action for the administration of such money.<sup>1</sup>

3. *X* is the foreign personal representative of *T*, who dies in a foreign country. *X* is guilty of a breach of trust in omitting to invest moneys left under *T*'s will for the benefit of *N*. *X*, when in England, is liable, not as foreign personal representative, but as trustee, to an action for breach of trust.<sup>2</sup>

4. *N*, an Englishman, dies intestate in a foreign country where he is possessed of real and personal property. *X*, his brother, who resides in England, is personal representative of *N* under the law of such foreign country, and there takes succession to *N* in a manner which renders *X* personally liable for the debts of *N*. *A*, a creditor of *N*, can maintain an action in England against *X* for a debt due from *N*, *i.e.*, *X* is liable, not as personal representative of *N*, but as being himself a debtor under the law of a foreign country.<sup>3</sup>

*Extension of Irish Grant and Scotch Confirmation to  
England.*

RULE 122.<sup>4</sup>—An Irish grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said Court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant.

<sup>1</sup> Proviso 1. See *Lowe v. Fairlie* (1817), 2 Mad. 101; *Sandilands v. Innes* (1829), 3 Sim. 263; *Bond v. Graham* (1842), 1 Hare, 482.

<sup>2</sup> Proviso 2. *Twyford v. Trail* (1834), 7 Sim. 92, 108.

<sup>3</sup> See *Beavan v. Hastings* (1856), 2 K. & J. 724.

<sup>4</sup> "From and after the period at which this Act shall come into operation [1st January, 1858], when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to, and a copy thereof deposited with, the Registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and, being duly stamped, shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England." The Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 95.

See, further, the Judicature Act, 1873. Compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

For meaning of "Irish grant," see Rule 76, p. 350, *ante*, the comment on which applies *mutatis mutandis* to this Rule.

RULE 123.<sup>1</sup>—A Scotch confirmation of the executor of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposition of a copy thereof with the proper officer of the said Court, be sealed with the seal of the said Court, and have thereupon in England the like force and effect as an English grant.

#### Comment.

In accordance with this Rule a Scotch confirmation, which is equivalent to an English grant of probate or letters of administration, may, by formal proceedings, be extended to England so as to have there the operation of an English grant.

Note, however, that a Scotch confirmation can be extended to England only when the deceased is stated to have died domiciled in Scotland, and has left personal estate both in Scotland and in England. The statement that he has died domiciled in Scotland must be inserted by the proper Scotch official in or on the confirmation.<sup>2</sup>

#### *Extension of Colonial Grant to England.*

RULE 124.<sup>3</sup>—Whenever the Colonial Probates Act,

<sup>1</sup> “When any confirmation of the executor of a person who shall . . . have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the Registrar, together with a certified copy of the Interlocutor of the Commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.” Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56), s. 12.

See, further, the Judicature Act, 1873; the Sheriff Court (Scotland) Act, 1876, s. 41. Compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

And see Rule 77, p. 351, *ante*, and comment thereon.

<sup>2</sup> See 21 & 22 Vict. c. 56, ss. 12, 15; 39 & 40 Vict. c. 70, s. 41.

<sup>3</sup> “(1) Where a Court of Probate in a British possession, to which this Act [*i.e.*, Colonial Probates Act, 1892] applies, has granted probate or letters of adminis-



1892, is by Order in Council made applicable to any British possession, *i.e.*, to any part of the British dominions not forming part of the United Kingdom, the grant of probate or letters of administration will, on

(1) payment of the proper duty, and

(2) production of the said grant to, and deposition of a copy thereof with, the High Court in  
.. England,

be sealed with the seal of the said Court, and thereupon be of the like force and effect, and have the same operation in England, as an English grant.

“tration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of Probate in the United Kingdom, be sealed with the seal of that Court, and thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court.

“(2) Provided that the Court shall, before sealing a probate or letters of administration under this section, be satisfied,—

“(a) that probate duty has been paid in respect of so much (if any) of  
“the estate as is liable to probate duty in the United Kingdom;  
“and,

“(b) in the case of letters of administration, that security has been given  
“in a sum sufficient in amount to cover the property (if any) in  
“the United Kingdom to which letters of administration relate :

“and may require such evidence, if any, as it thinks fit, as to the domicile of the deceased person.”

Colonial Probates Act, 1892 (55 Vict. c. 6), s. 2, sub-ss. (1) and (2). See, further, s. 6, and Interpretation Act, 1889, s. 18, sub-s. (2). The Act applies to all parts of the United Kingdom, but the present Rule is concerned only with its effect in England. See Rule 78, p. 353, *ante*.

As to resealing, see *In Goods of Sanders*, [1900] P. 292. ^

## BOOK III.

### CHOICE OF LAW.

THE Rules contained in Book III. deal solely with the Choice of Law.<sup>1</sup>

Their object is the determination of the body of law<sup>2</sup> which is to be selected by the High Court when called upon to decide any case which has in it a foreign element.<sup>3</sup>

The Rules contained in Book III. have nothing to do with the jurisdiction either of the High Court<sup>4</sup> or of foreign Courts.<sup>5</sup>

But though a question as to the choice of law is in itself a totally different thing from a question of jurisdiction, there exists occasionally a difficulty in discriminating at a glance between the two inquiries; for a question as to the choice of law may look like

<sup>1</sup> As to Choice of Law, see Intro., pp. 2, 23—40, 58—63, *ante*; and compare Holland, Jurisprudence, ch. xviii.; Pillet, Principes de Droit International Privé, chaps. viii.—xvi.

<sup>2</sup> The body of law, whether English or foreign, which ought to be chosen for the determination of a particular case, or class of cases, depends upon the nature of the right which is in dispute, and rights are naturally divided in accordance with their subject-matter. Hence the Rules as to the Choice of Law are conveniently distributed under the following heads:—

- (1) Status or Capacity.—Chaps. xix. and xx., *post*.
- (2) Family Relations.—Chap. xxi., *post*.
- (3) Immovables.—Chap. xxiii., *post*.
- (4) Movables.—Chap. xxiv., *post*.
- (5) Contracts.—Chaps. xxv. and xxvi., *post*.
- (6) Marriage.—Chap. xxvii., *post*.
- (7) Torts.—Chap. xxviii., *post*.
- (8) Administration in Bankruptcy.—Chap. xxix., *post*.
- (9) Administration and Distribution of Deceased's Movables.—Chap. xxx., *post*.
- (10) Succession to Movables.—Chap. xxxi., *post*.
- (11) Procedure.—Chap. xxxii., *post*.

This distribution of our subject, though convenient, makes no claim to any special logical precision.

<sup>3</sup> For meaning of "foreign element," see Intro., p. 1, *ante*.

<sup>4</sup> As to the jurisdiction of the High Court, see Book II., Part I., pp. 195—353, *ante*.

<sup>5</sup> As to the jurisdiction of Foreign Courts, see Book II., Part II., pp. 354—455, *ante*.

a question as to jurisdiction. That this is so may be shown by the following illustration : *A* brings in England an action against *X* for an assault at Paris ; *X*'s defence is that the assault was by French law justifiable, and that *A* therefore cannot, in an English Court, recover damages for it. The defence looks like an objection to the jurisdiction of the Court ; but this appearance will be found on examination to be delusive. Whatever be the technical form of *X*'s defence, he in substance pleads, not that the High Court has no right to adjudicate upon an assault committed in France, but that the question whether *X* was or was not guilty of an assault, *i. e.*, of an unlawful attack upon *A*, must be determined in England by reference, not to the law of England, but to the law of France. *X* therefore raises a question as to the choice of law.<sup>1</sup>

<sup>1</sup> As to law governing torts, see chap. xxviii., p. 645, *post*.

## CHAPTER XIX.

## STATUS.

RULE 125.<sup>1</sup>—Transactions taking place in England are not affected by any status existing under foreign law which either

- (1) is of a kind unknown to English law, or
- (2) is penal.

## Comment.

*Status*.—Every person has a certain civil status,<sup>2</sup> consisting of his capacity for the acquisition and exercise of legal rights and for the performance of legal acts. Thus *A*'s status or personal condition may be that of the ordinary or average citizen, who is of full age, legitimate, unmarried, and so forth, and has incurred no legal disability. Such a person has in England the capacity to inherit, to make a will, to bind himself by contracts, to change his domicile, and the like. His status, just because it is the average or ordinary condition, receives no special name. *A*'s condition or status, on the other hand, may differ from the ordinary standard in that he has legal capacities which either fall short of or exceed those of the ordinary citizen, so that he occupies a position by virtue of which, as it has been expressed,<sup>3</sup> what is law for the average citizen is not law for him. Thus, if he is illegitimate, he does not inherit in cases in which the average citizen would do so. If he is an infant, he is not bound by contracts which bind others. If he is married, he has rights and incurs liabilities beyond those of the ordinary or average citizen. As *A*'s position is in these instances marked off from, and contrasted with, the condition of ordinary citizens, it receives a name such as that of illegitimacy, infancy, &c., and is clearly recognised as a

<sup>1</sup> Compare Intro., General Principle No. II. (B), p. 34, *ante*, and Rule 40, p. 207, *ante*. See Story, ss. 91, 92, 94—104, 620—625 *c*.

As to how far the last clause of the Rule applies to countries subject to the British Crown?

<sup>2</sup> See, especially, Holland, *Jurisprudence*, chap. ix.

<sup>3</sup> See Westlake (1st ed.), s. 89.

status; and *A* has a status which may, in very general terms, be described as being "the legal position of [*A*] in or with regard to the rest of a community."<sup>1</sup>

From the nature of status it is apparent that the term is a relative one, varying according to the laws of different communities. A man, for example, may be legitimate if his status is to be determined by the law of France, illegitimate if it is to be determined by the law of England. In no matter, moreover, do the laws of different countries differ more widely than in their rules as to status. Conditions, such as that of slavery, monastic celibacy, or civil death, which are known to the law of one State are unknown or absolutely repugnant to the legal system of another. Conditions, again, which in one form or another exist throughout the civilised world, are in different countries governed by different rules, and involve different incidents. Minority, to take one example, may terminate under one law at 21, under another at 24, under a third at 25; and it may safely be asserted that in almost every different country the incapacities or the privileges of a minor are somewhat different.

When, therefore, it is necessary to determine what is a person's status, and how far his rights or acts are affected thereby, it is necessary, further, to determine what is the law with reference to which his status or condition must be fixed. Whether our Courts have on this subject adopted any one invariable principle may be doubted; but they have, of recent years, gone so far as to hold that an individual's legal condition is, in many cases, liable to be affected by the law of his domicile,<sup>2</sup> and perhaps they may be said to have adopted, in a very general way, the rule that status depends *prima facie* on domicile; but in practice this principle is subjected to limitations and exceptions which often go near to invalidating it.<sup>3</sup>

*Status unknown to English Law.*—The law of England will not in England allow any status (such, for example, as relationship arising from adoption),<sup>4</sup> which is unknown to English law, to

<sup>1</sup> *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 11, per Brett, L. J.

<sup>2</sup> See *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; *Udny v. Udny* (1869), L. R. 1 Sc. Ap. 441.

<sup>3</sup> See *Male v. Roberts* (1800), 3 Esp. N. P. 163. See, *e. g.*, Rule 149, p. 534, and Exceptions thereto, pp. 538—540, *post*.

<sup>4</sup> An intestate dies domiciled in England. *N*, the intestate's brother, has, before the intestate's death, become domiciled in California, and has there, in accordance with the law of California, adopted *A* as his son. *N* dies before, but *A* survives, the

have legal effects as regards transactions in England. Thus, even at the time when slavery existed in the English colonies, the status of a slave was not recognised in England, and a master who brought his slave there lost the right of ownership over him whilst in England.<sup>1</sup> "Slavery," it was laid down, "is a local law, and therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains; for the instant they get beyond the limits where slavery is recognised by the local law they have broken their chains, they have escaped from their prison and are free."<sup>2</sup> On similar grounds, English Courts will not in England give effect to a polygamous marriage.<sup>3</sup> Nor will they give any effect in England to disabilities arising from religious vows, from religious belief (as, for instance, where Jews or Protestants are under disabilities by the law of their domicile), or from "civil death," or "infamy,"<sup>4</sup> or from a person being declared a "prodigal," and, therefore, under the law of a foreign country, incapable of suing.<sup>5</sup>

*Penal status.*—A penal status means one which is imposed upon a person in order to deprive him of rights or to inflict punishment upon him, as where *X* is affected with attainder. Such a penal status, though inflicted by the law of the country where *X* is domiciled, and though known to English law, will not be allowed to affect *X* as regards his rights to property in England.

"It is a general principle that the penal laws of one country cannot be taken notice of in another."<sup>6</sup> "I would," says Lord Loughborough, "even go farther, and say a right to recover any . . . specific property, such as plate or jewels, in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority. A fugitive who passes hither comes with all his

intestate. *A* cannot claim the intestate's movables in England as next of kin, *i.e.*, English law does not acknowledge relationship by adoption. Conf. *Blythe v. Ayres* (1892), 96 Cal. 532; 31 Pac. 915.

<sup>1</sup> *Sommerset's Case* (1771), 20 St. Tr. 1. See *The Slave Grace* (1827), 2 Hag. Ad. 94.

<sup>2</sup> *Forbes v. Cochrane* (1824), 2 B. & C. 448, 467, per Best, J.

<sup>3</sup> *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130.

<sup>4</sup> See Story, ss. 91, 92, 620—624; 1 Blackst. Comm. 132, 133.

<sup>5</sup> See *Worms v. De Valdor* (1880), 49 L. J. Ch. 261; and compare *Atkinson v. Anderson* (1882), 21 Ch. D. 100; *In re Selot's Trust*, [1902] 1 Ch. 488.

<sup>6</sup> *Ogden v. Polliott* (1790), 3 T. R. 726, 733, per Buller, J.

“transitory rights; he may recover money held for his use, stock, obligations, and the like, and cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.”<sup>1</sup>

### Illustrations.

1. *A* is a Californian born in California, and whilst there domiciled becomes under the law of California the adopted son of *B*, who at the time of the adoption is a Californian domiciled in California. He has no other son. *B*, after the adoption of *A*, becomes domiciled in England and dies there intestate, leaving money in English funds. Any right of *A* under Californian law to succeed to *B*'s property in England as *B*'s adopted son will (*semble*) not be recognised in England.<sup>2</sup>

2. *A*, a French citizen domiciled in France, is a person of full age, but being of extravagant habits is, by a French Court of competent jurisdiction, adjudged to be a “prodigal,” and is placed under the control of a *conseil judiciaire* (legal adviser). He is, as a prodigal, incapable of receiving or giving a receipt for his movable property without the consent of such adviser. He becomes entitled to a fund in Court in England. The status of a prodigal is unknown to English law and is a penal status. *A* has a right to receive the fund in Court on his own receipt, in spite of the opposition of his legal adviser.<sup>3</sup>

3. A Roman Catholic priest is a citizen of, and domiciled in, a foreign country, under the law of which he is, as a priest, incapable of marriage. He marries an Englishwoman in England. The marriage is valid, *i.e.*, English law does not recognise a disability unknown to the law of England.

RULE 126.<sup>4</sup>—Any status existing under the law of a

<sup>1</sup> *Folliott v. Ogden* (1789), 1 H. Bl. 123, 135. See also *Wolff v. Oxholm* (1817), 6 M. & S. 92, 99. Compare *Lynch v. Provisional Government of Paraguay* (1871), L. R. 2 P. & D. 268; and *Huntington v. Attrill*, [1893] A. C. 150. And see Rule 40, p. 207, *ante*.

<sup>2</sup> The status of adopted child is unknown to English law.

<sup>3</sup> *In re Selot's Trust*, [1902] 1 Ch. 488; *Worms v. De Valdor* (1880), 49 L. J. Ch. 261. Whether the Lunacy Act, 1890 (53 Vict. c. 5), s. 108, sub-s. (3), does not create a status somewhat similar to that of the prodigal?

<sup>4</sup> Compare Phillimore, s. 381; Wharton, s. 125. *Folliott v. Ogden* (1789), 1 H. Bl. 123, throws some doubt on the principle of this rule if carried out to its full extent. See, however, *Ogden v. Folliott* (1790) (in error), 3 T. R. 726, by which it

person's domicile is recognised by the Court as regards all transactions taking place wholly within the country where he is domiciled.

### Comment.

Our Courts recognise every kind of status or personal condition held under the law of a country where a person is domiciled, in so far as such status affects acts done and rights exercised wholly in that country. Hence it has been laid down, with substantial accuracy, that "the status of persons with respect to acts done and rights acquired *in the place of their domicile*, and contracts made *concerning property situated therein*, will be governed by the law of that domicile; and that England . . . will hold as valid or invalid such acts, rights, and contracts, according as they are holden valid or invalid by the law of the domicile."<sup>1</sup>

This clearly is so as regards any person domiciled in England. The transactions of such a person in England are, in so far as they may be affected by status, governed by English law. If *A*, for example, is a Frenchman domiciled in England, his capacity to contract in England depends on English law, without reference to the law of France.<sup>2</sup>

The same principle applies to persons domiciled in a foreign country. If an English Court undertakes to determine the effect of acts done and rights exercised in a foreign country where a person is domiciled, the Court will recognise the effect of his status under the law of his domicile, without any reference to what would have been the status of such a person in England, or to what might or might not be the effect of his foreign status on transactions taking place in any other country than that of his domicile.

Suppose, for example, that minority lasts in a foreign country till the age of 24. If *A*, an Englishman who is of age at 21, is domiciled in such foreign country, and makes a gift, or sells goods,

seems that the real ground of decision was that the confiscation by the State of New York, being made during the Rebellion, was held by our Courts inoperative, even as regards property in New York. See judgment of Kenyon, C. J., 3 T. R. 731; *Newton v. Manning* (1849), 1 M. & G. 362, 364.

<sup>1</sup> Phillimore, s. 381.

<sup>2</sup> In many of the cases falling under this rule the *lex actus* (or law of the country where a transaction takes place) and the *lex domicilii* are the same. It is therefore difficult to say for certain whether the character of the transaction is determined by our Courts with a view to the *lex actus* or the *lex domicilii*. Still the law of domicile would appear to be the guiding consideration.



or enters into a contract there, the effect of the transaction will be judged of by our Courts with reference to whatever be the privileges or incapacities of a minor under the law of such foreign country. So, again, though civil death is not now known to our law,<sup>1</sup> its effects on the rights of a person affected by it in the country where he is domiciled will be noticed by our Courts. If, for example, under the law of Spain, the property of a person who becomes a monk should devolve, say, on his heir, English law would recognise the fact of the property in Spain of a person there domiciled having, through his taking monastic vows, devolved upon his heir. In other words, our Courts would (it is conceived), to this extent at any rate, recognise the effect of the monastic status.<sup>2</sup>

RULE 127.<sup>3</sup>—In cases which do not fall within Rule 125, the existence of a status existing under the law of a person's domicile is recognised by the Court, but such recognition does not necessarily involve the giving effect to the results of such status.

#### Comment.

*Three views as to status.*—Three opinions, at least, may be held as to the relation between a person's status, or personal capacity, and the law of his domicile.

*First view.* A person's status depends (subject to certain exceptions coinciding in the main with cases falling under Rule 125) wholly on the law of his domicile.

This is the view maintained by many foreign jurists, and notably by Savigny.<sup>4</sup>

According to this opinion, a person who is legitimate, or a minor, by the law of his domicile, is to be considered as legitimate or a

<sup>1</sup> See 1 Blackst. Comm., pp. 132, 133.

<sup>2</sup> Compare *Santos v. Illidge* (1860), 29 L. J. C. P. 348; 8 C. B. N. S. (Ex. Ch.) 861. The case is noticeable as showing the extent to which English Courts will, in regard to transactions in a foreign country, recognise the existence of conditions, such as slavery, unknown to English law.

<sup>3</sup> In support of this Rule, see the authorities given in support of the Rules as to particular kinds of status. "It is a settled rule of English law that civil status, "with its attendant rights and disabilities, depends, not upon nationality, but upon "domicil alone." Judgment of P. C., *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, 437.

Compare *Armytage v. Armytage*, [1898] P. 178, 186, judgment of Sir J. Gorell Barnes.

<sup>4</sup> Savigny, s. 362, Guthrie's transl. (2nd ed.), p. 148.

minor all the world over. Thus, if *A*, a person domiciled in Scotland, is legitimate by the law of Scotland, he ought, though born out of lawful wedlock,<sup>1</sup> to be considered legitimate in England. So an Englishman, domiciled in a foreign country where minority lasts till 24, who is of the age of 22 should, according to the view we are now considering, be treated as a minor in England till 24, and on similar grounds a domiciled Englishman of 22 ought to be considered of full age in such foreign country.

From this view the consequence logically follows that not only the fact of a person having a particular status, *e.g.*, of legitimacy, but also all the legal effects of such status, ought to be everywhere determined by the law of his domicile. If, for example, *A* is legitimate under the law of his Scotch domicile on account of his parents having married after his birth, he not only ought to be considered legitimate in England, but ought also (though he would be illegitimate according to English local law) to possess in England all the privileges of legitimacy, both as to the inheritance of real estate and otherwise.

A person's civil status, in short, ought, on this view, to be "governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status."<sup>2</sup>

This principle has never been fully accepted by our Courts, though of recent years they have shown a marked inclination to adopt it.<sup>3</sup>

<sup>1</sup> Compare Rule 137, p. 479, *post*.

<sup>2</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1.

<sup>3</sup> The verbal admission of the correctness of this principle has been combined with the practical refusal to adopt it by means of considering features in a legal transaction, which in fact involve questions of status, as belonging to the form of the transaction, and therefore as depending on the *lex loci contractus*, or, in more general terms, on the *lex actus*, or law of the country where the transaction takes place. Thus, the necessity for the consent of parents to the marriage of a minor has been treated as belonging to the formalities of the marriage. *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. See *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46.

Those countries which, like Italy, wholly disconnect status and domicile by making personal condition depend, not upon domicile, but upon nationality or allegiance (Codice Civile del Regno d'Italia, Art. 6), adopt a view which at bottom is not very dissimilar from the first view, which we may call that of Savigny; though differing from him as to the test by which to determine what is the country to which an individual belongs, they agree with him in holding that a person's status under the law of the country to which he belongs ought to be his status in every other country.

*Second view.* No status conferred only by the law of a person's domicile is to be recognised as regards transactions taking place in another country.

This view is, in its most extreme form, the exact opposite of the first theory. If it were completely carried out, it would make status a matter purely of local law. No civilised State has ever fully adopted it, and English Courts have certainly never gone the length of applying it, at any rate in its full extent, to the status of persons domiciled in England; and a comparison of more or less recent cases<sup>1</sup> exhibits on the whole a distinct tendency on the part of English Courts to approximate in practice to the theory that a person's status is governed by his *lex domicilii*. Eminent writers have, however, held that the view now under consideration was at one time adopted by English law with regard to the status of persons domiciled in a foreign country.<sup>2</sup>

*Third view.* The existence, at any rate, of a status imposed by the law of a person's domicile ought in general to be recognised in other countries, though the Courts of such countries may exercise their discretion in giving operation to the results or effects of such status.

This is the principle (if so it can be called) which is meant to be stated in Rule 127,<sup>3</sup> and which, it is conceived, most nearly corresponds with the actual practice of our Courts. It constitutes a kind of practical compromise between the first and the second views,<sup>4</sup> and enables the Courts to recognise the existence of a status

<sup>1</sup> *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *Goodman v. Goodman* (1862), 3 Giff. 643; *Boyes v. Bedale* (1863), 1 H. & M. 798; 33 L. J. Ch. 283; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. But contrast *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97; *Ogden v. Ogden*, [1908] P. (C. A.) 46.

Contrast with the present state of things the statement of Westlake in the first edition of his work on Private International Law: "While the English law remains as it is, it must, on principle, be taken as excluding, in the case of trans- actions having their seat here, not only a foreign age of majority, but also all foreign determination of status or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent." Westlake (1st ed.), s. 402, p. 384. This language, which does not re-appear in the later editions of Mr. Westlake's work, accurately represented English law as it existed in 1858, but does not represent English law as it exists at the present day; it has been greatly modified by the judicial decisions of the last fifty years.

<sup>2</sup> See Westlake (1st ed.), s. 402, and compare Story, s. 98.

<sup>3</sup> See p. 463, *ante*.

<sup>4</sup> This principle comes very near to the opinion of some jurists that a distinction ought to be made between the existence of a status—for example, minority—and

acquired under the law of a person's domicile, while avoiding the practical difficulties which arise from subjecting legal transactions to rules of law which may be unknown in the country where the transaction takes place.

The operation of Rule 127 may be thus illustrated:—

The son of a father domiciled in France is legitimate, according to the law of France, in consequence of the marriage of his parents after his birth. His legitimacy is certainly for some purposes recognised by English Courts.<sup>1</sup> On the other hand, he is not allowed by English tribunals the whole of the advantages which, had he been born after his parents' marriage, would have accrued to him under English law as his father's heir, for he is not allowed to succeed to English real estate.<sup>2</sup>

So, again, a person's appointment as guardian of a minor under the minor's *lex domicilii* is certainly recognised as a fact by English judges,<sup>3</sup> but it cannot be said that the powers of a foreign guardian are, as such, recognised in England.<sup>4</sup>

When the bearing of our Rule is understood, two points with regard to it become apparent.

The Rule, in the first place, though it is all which can be extracted by way of principle from decided cases, is seen to be so vague as to be of comparatively little use for practical purposes. The fact that the existence of a particular status under a person's

the legal results or effects of it, and that, while the existence of the status ought to be determined wholly by the law of the person's domicile, the extent to which effect should be given in other countries to the results of such status, *e.g.*, to the minor's incapacity to contract, depends upon other laws, as, for example, the *lex loci contractus*, or the law of the place where the contract is made. As a speculative view, this opinion is obviously open to criticism, but its inconsistency represents in a theoretical form the difficulty which the Courts of any country are certain to feel in practice of either, on the one hand, referring questions of status wholly to the *lex domicilii*, or, on the other hand, entirely refusing recognition to personal conditions imposed by the law of a person's domicile.

The great practical inconvenience of holding that a man of twenty-four who enters into a contract in England is not bound by it here, because by the law of his foreign domicile he is a minor, may be taken as one illustration of the difficulty of carrying out to the full the principle that status depends upon the law of domicile.

See, as to the difference between the recognition and the enforcement of a right, Intro., p. 31, *ante*.

<sup>1</sup> *Skottowe v. Young* (1871), L. R. 11 Eq. 474.

<sup>2</sup> Rule 137, p. 479, *post*.

<sup>3</sup> See *Nugent v. Vetzera* (1886), L. R. 2 Eq. 704; *Di Savini v. Lousada* (1870), 18 W. R. 425.

<sup>4</sup> *Stuart v. Bute* (1861), 9 H. L. C. 440. See Rules 133—135, pp. 475—478, *post*.

*lex domicilii* is generally recognised does not answer the important question how far the capacities or incapacities of an individual under the law, for example, of his French domicil, will be allowed by English Courts to affect transactions in England. The answer to this inquiry (as far as, in the dearth of authorities, it can be given at all) must be sought for in the rules deducible from English decisions with regard to the recognition to be given to particular kinds of personal condition or status.<sup>1</sup>

The Rule, in the second place, applies to two different classes of cases, that is to say, to cases in which English Courts have to consider the effect to be given to an English status as regards transactions taking place out of England, and to cases in which English Courts have to consider the effect to be given to a foreign status as regards transactions taking place in England.

When, however, the decisions as to particular kinds of status are examined, it will be found that they throw, comparatively speaking, little light on the answer to the question what are the limits within which our Courts will recognise the effect of an English status on transactions taking place abroad. We may probably, indeed, conclude that their inclination will be to give effect to an English status as regards transactions in a foreign country; thus, a married man domiciled in England is, under English law, guilty of bigamy, if having obtained a divorce from his wife in a foreign country where he is not domiciled, he, during his wife's lifetime, marries another woman.<sup>2</sup> A person domiciled in England is incapable of marrying his deceased brother's widow, and cannot rid himself of his incapacity by marrying in a country where such marriage is lawful;<sup>3</sup> and a person who, being domiciled at birth in England, is born out of lawful wedlock is incapable of legitimisation under the law of a foreign country.<sup>4</sup> On the other hand, the tendency of our Courts is to hold that, as regards, at any rate, capacity to contract, the effect of an English status is, even in the

<sup>1</sup> Rule 125, p. 458, *ante*, must always be borne in mind. It denies any effect as regards transactions in England to whole classes of personal conditions, *e.g.*, slavery.

<sup>2</sup> *Lolley's Case* (1812), 2 Cl. & F. 567 (n.). The divorce is in England a nullity. See Rule 87, p. 384, *ante*.

<sup>3</sup> *Brook v. Brook* (1861), 9 H. L. C. 193, and chap. xxvii., Rules 172, 173, pp. 613—629, *post*.

<sup>4</sup> *Re Wright's Trusts* (1856), 25 L. J. Ch. 621; 2 K. & J. 595.

case of a domiciled Englishman, sometimes overridden by the law of the country where the contract is made.<sup>1</sup>

The decisions throw more light on the answer to the inquiry, what are the limits within which our Courts will recognise the effect of a foreign status on transactions taking place in England, and make it possible to lay down in several cases rules with regard to the effect of a given foreign status. These rules may be considered applications of Rule 127.

<sup>1</sup> See Exception 1, p. 538, to Rule 149, *post*; 2 Fraser, *Treatise on Husband and Wife* (2nd ed.), pp. 1317, 1318.

## CHAPTER XX.

### STATUS OF CORPORATIONS.<sup>1</sup>

RULE 128.<sup>2</sup>—The existence of a foreign corporation duly created under the law of a foreign country is recognised by the Court.

#### Comment.

The principle is now well established that a corporation duly created in one country is recognised as a corporation by other countries. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals.

RULE 129.<sup>3</sup>—The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs.

#### Comment and Illustrations.

The power or capacity of a corporation is limited in a twofold manner.

*First.* Its capacity is limited by its constitution. A corporation, for example, which is prohibited by its constitution from the purchase of land, has no power to effect a valid purchase of land in any country; for the corporation exists as such only by virtue of its constitution, and any acts done in contravention of its constitution by its directors or others are *ultra vires*, and in strictness not the acts of the corporation.

<sup>1</sup> As to foreign corporations, see 2 Lindley, *Company Law* (6th ed.), Appendix, No. 1; *Foreign Companies*, pp. 1221—1228; Westlake, chap. xvi.; Foote (3rd ed.), pp. 126—148; Wharton, ss. 105, 105 d; and *La Société Anonyme des Anciens Établissements Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513.

<sup>2</sup> See Intro., General Principle No. I., p. 23, *ante*.

<sup>3</sup> Lindley, *Company Law* (6th ed.), p. 1226.

*Secondly.* Its capacity is limited by the law of the country where a given transaction takes place. It cannot do any act forbidden by the law of such country.

Thus a foreign corporation authorised by its constitution to acquire and hold land cannot hold land in England in contravention of the Mortmain Acts.

Similarly an English corporation empowered by its terms of association to purchase land, work mines, &c. in a foreign country, cannot obtain land in a colony or other foreign country if the holding of land by a corporation is prohibited by the laws of such foreign country.

Practically the most important question which arises "with reference to foreign companies, relates to the personal liabilities of their members. If a company is incorporated by a foreign government, so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members, as such, will be the same in [England] as in the country which created the corporation.<sup>1</sup> But, with respect to unincorporated companies, the measure of liability in respect of any given transaction, seems, upon principle, to depend upon the law of the place where the transaction in question occurred (*lex loci contractus*). The law of agency, as administered in that place, would, it is conceived, have to be applied; and the law of the place where the company might be considered as domiciled would only be material for the purpose of determining the authority given by the members to the agents by whom the transactions in question were conducted."<sup>2</sup>

1. X takes shares in an English company constituted under the Joint Stock Companies Acts as a limited company for the carrying on of a mining business in California. The company works a mine there, and incurs a debt for which, under Californian law, X is, as a member of the company, personally liable. An action is brought in England against X for the recovery of the debt. X is not liable, *i.e.*, X's liability is limited by the constitution of the company.<sup>3</sup>

2. The same principle applies (it is submitted) if X is a member

<sup>1</sup> *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877.

<sup>2</sup> 2 Lindley, *Company Law* (6th ed.), p. 1227. See *Maunder v. Lloyd* (1862), 2 J. & H. 718; Story, s. 320 a; and Rule 171, p. 609, *post*.

<sup>3</sup> *Risdon Iron and Locomotive Works v. Furness*, [1906] 1 K. B. (C. A.) 49.



of a Victorian company constituted under the law of Victoria for carrying on business in England. Whether *X* is personally liable for the debts of the company incurred in England depends upon the answer to the inquiry whether he is or is not liable according to the law of Victoria—*i.e.*, depends upon the constitution of the company.

## CHAPTER XXI.

### FAMILY RELATIONS.

#### (A) HUSBAND AND WIFE.

RULE 130.<sup>1</sup>—The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England.<sup>2</sup>

#### Comment.

The question, what amount of control a husband may exercise over the freedom of his wife, and what amount of force (if any) he may use in controlling her, must be answered with reference to the law of the place where they are residing.

Our Courts certainly would not allow a foreigner, when in England, whatever might be his domicile, to exercise over his wife any power which might not be lawfully exercised by an Englishman. It seems, also, that a foreigner, resident with his wife in England, may, though not domiciled here, apply to our Courts for restitution of conjugal rights.<sup>3</sup>

#### (B) PARENT AND CHILD.<sup>4</sup>

RULE 131.<sup>5</sup>—The authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England.

<sup>1</sup> See Wharton, s. 120; *Polydore v. Prince* (Am.), Ware, 402; Phillimore, s. 486. As to effect of marriage on property of husband and wife, see in reference to immovables, Rule 141, p. 500, and pp. 503, 504, 510, 512, *post*, and to movables, Rules 174—176, pp. 635—643, *post*.

<sup>2</sup> As to meaning of law of England, see pp. 79—81, *ante*.

<sup>3</sup> See *Connelly v. Connelly* (1851), 7 Moore, P. C. 438.

<sup>4</sup> See Story, s. 463 a; Westlake (4th ed.), p. 45; Phillimore, ss. 522—531; Wharton, ss. 253, 254.

<sup>5</sup> See *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 114; *Nugent v. Votzera* (1866), L. R. 2 Eq. 704.

## Comment.

By the law of England, the parental authority of a foreign father over his child is recognised, but "the authority so recognised is only that which exists by the law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than in this country, is it supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child living in England by the laws of England, and not by the laws of the country to which the child belongs."<sup>1</sup>

A Frenchman, domiciled in France, is travelling in England with his son 10 years old. He flogs the child for some fault. Whatever the laws of France, the father's authority to administer such punishment cannot be questioned in an English Court, since he has not exceeded the limits of authority recognised by English law. If, again, the French father, in punishing his son, exceeds the limits of what is deemed by English law reasonable chastisement when inflicted by an English parent, he cannot justify his conduct here by showing that the punishment is allowed by French law.

RULE 132.<sup>2</sup>—The rights of a parent domiciled in a foreign country over the movables in England belonging to a minor are, possibly, governed by the law of the parent's domicile, but are more probably governed, while the minor is in England, by the law of England.

## Comment.

There is little or no authority (except one case) as to a foreign father's rights in respect of the movables of a minor. The tendency of English law to follow the maxim, *mobilia sequuntur personam*, rather favours the view that the parent's rights may depend on the *lex domicilii*. But the case itself<sup>2</sup> is not decisive. *H*, an Englishman domiciled in Holland, married *W* in Holland, where *W* was

<sup>1</sup> *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 114.

<sup>2</sup> *Gambier v. Gambier* (1835), 7 Sim. Rep. 263. As to immovables, see Rule 141, p. 500, *post*.

then domiciled. Under the marriage settlement of *W*, and a subsequent judicial compromise in Holland, their children became, on *W*'s death, entitled to one fourth of certain property of *W*'s in the English funds. By the Code Napoléon, which is the law of Holland, a surviving parent has, while children are under the age of 18, the enjoyment of their property. *H* and *W* removed to, and became domiciled in, England, and had children born to them there. *W* died, and, the children being under 18, the question arose as to *H*'s rights in respect of their property in the English funds. It was held that *H* had no right to it.

The grounds of the decision were thus explained:—

“By the Code Napoléon, which is the law of Holland, as well as of France, when children are under the age of 18 their surviving parent has the enjoyment of their property until they attain that age. *But that is nothing more than a mere local right, given to the surviving parent by the law of a particular country, so long as the children remain subject to that law; and, as soon as the children are in a country where that law is not in force, their rights must be determined by the law of the country where they happen to be. These children were never subject to the law of Holland; they were both born in this country, and have resided there ever since. The consequence is, that this judicial decree has adjudged certain property to belong to two British-born subjects domiciled in this country; and, so long as they are domiciled in this country, their personal property must be administered according to the law of this country. The claim of their father does not arise by virtue of the contract, but solely by the local law of the country where he was residing at the time of his marriage; and therefore this property must be considered just as if it had been an English legacy given to the children; and all that the father is entitled to, is the usual reference to the Master, to inquire what allowance ought to be made to him for the past and future maintenance of his children.*”<sup>1</sup>

All the parties were domiciled in England, and therefore the case may have been decided on the ground of domicile; but the expressions in the judgment seem to imply that the rights of the children were to be determined by the law, not of the domicile, but of the country where they happened to be, which in this case was England, although the same country was, as it chanced, that of their domicile.

<sup>1</sup> *Gambier v. Gambier* (1835), 7 Sim. 263, 270, per Shadwell, V.-C

(C) GUARDIAN AND WARD.<sup>1</sup>

RULE 133.<sup>2</sup>—A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian) has no direct authority as guardian in England; but the Court recognises<sup>2</sup> the existence of a foreign guardianship, and may, in its discretion, give effect to a foreign guardian's authority over his ward.

## Comment.

A foreign guardian has, as such, no rights in England. Guardianship is considered by our Courts as an institution existing under the local law of the country where the guardian is appointed, and as being, in fact, part of the administrative law of that country. The rights, therefore, of a guardian are considered not to extend beyond the limits of the country where he receives his appointment. Hence a Scotch guardian appointed in Scotland has (it has been held<sup>3</sup>) no authority in England.

"Foreign tutors and curators . . . cannot be English guardians without being able to derive their authority from some one of those sources from which the English law considers that the right of guardianship must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognised by the Courts of this country with reference to a child residing in this country. The result is, that such foreign tutor and curator can have no right, as such, in this country; and this so necessarily follows from reason, and from the rules which regulate in this respect the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found."<sup>4</sup>

The effect of this language is, it is true, modified by expressions used in a later case,<sup>5</sup> but it still expresses the principle of English

<sup>1</sup> *Nugent v. Vetsera* (1866), L. R. 2 Eq. 704; *Stuart v. Bute* (1861), 9 H. L. C. 440; *Di Savini v. Lousada* (1870), 18 W. R. 425; *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *In re Chatard's Settlement*, [1899] 1 Ch. 712; Story, ss. 499, 499a; Phillimore, ss. 543—553a.

<sup>2</sup> As to difference between "recognition" and "enforcement" of rights, see *Intro.*, pp. 31, 32, *ante*.

<sup>3</sup> *Johnstone v. Beattie* (1843), 10 Cl. & F. 42.

<sup>4</sup> *Ibid.*, p. 114, per Lord Cottenham.

<sup>5</sup> *Stuart v. Bute* (1861), 9 H. L. C. 440, 470.

law. Hence, in spite of the existence of foreign guardians, other guardians have, on application, been appointed by our Courts;<sup>1</sup> foreign guardians have been prevented from removing their ward out of England,<sup>2</sup> and foreign guardians who wish to exercise their powers in England must apply to the Courts to be appointed English guardians.<sup>3</sup> Whether or not the Courts will give them authority is a matter of discretion, though the fact of the applicants being foreign guardians is of great weight in determining into whose custody the ward shall be committed.<sup>3</sup>

For the Courts in modern times certainly do recognise the existence of the foreign guardianship. Hence where two infants, Austrian subjects, were sent to England for education, the Court of Chancery refused to interfere with the discretion of the guardian, appointed by an Austrian Court of competent jurisdiction, when he wished to remove them from England in order to complete their education in Austria; but, English guardians having been already appointed, the Court refused to discharge the order by which they were appointed, and merely reserved to the foreign guardian the exclusive custody of the children, to which he was entitled by the order of the foreign Court.<sup>4</sup> The principles which guided the Court were explained as follows:—

“ I am now asked in effect to set aside the order of the Austrian Court, and declare that this gentleman so appointed cannot recall his wards, who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this Court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this Court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more starting than such a notion, which would involve, on the other hand, this result, that an English ward could not be sent to France

<sup>1</sup> *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704.

<sup>2</sup> *Dawson v. Jay* (1854), 3 De G. M. & G. 764.

<sup>3</sup> See Story, s. 499 a.

<sup>4</sup> *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704.

“ for his holidays without the risk of his being kept there and  
“ educated in the Roman Catholic religion, with no power to the  
“ father or guardian to recall the child. Surely such a state of  
“ jurisprudence would put an end to all interchange of friendship  
“ between civilised communities. What I have before me is  
“ nothing more or less than that case.”<sup>1</sup>

“ With respect to the English guardians of these children, I  
“ hold that the Court has power to appoint them, and I continue  
“ those that have been appointed. The case may well happen of  
“ foreign children in this country without anyone to look after  
“ or care for them, or who may require the protection of this  
“ Court to save them from being robbed and despoiled by those  
“ who ought to protect them. These children, on the other hand,  
“ seem to have met with nothing but kindness from their relations  
“ on all sides, but it may be desirable that, so long as they remain  
“ in this country, they should have the protection of guardians  
“ living within the jurisdiction. Out of respect to the authority  
“ of the Austrian Courts, by which this gentleman has been  
“ appointed, I reserve to him, in the order I am about to make,  
“ all such power and control as might have been exercised over  
“ these children in their own country if they were there, and had  
“ not been sent to England for a temporary purpose. Taking  
“ that view of the case, I have not asked to see the children. I  
“ could not be influenced by anything I might hear from them. I  
“ assume that they are most anxious to remain here, and not to  
“ go back to their own country; but I have no right to deprive  
“ the guardian appointed by the foreign Court over them of the  
“ control which he has lawfully and properly acquired, has never  
“ relinquished and never abandoned, and under which authority  
“ alone they have remained here and been maintained and sup-  
“ ported here.”<sup>2</sup>

Where an Italian Court had appointed guardians for an Italian infant, who came to England, and, being made a ward in Chancery, was, with the consent of the Italian guardians, placed in the custody of English guardians, who did not carry out the directions of the Italian guardians, the Court of Chancery, upon the application of the Italian Court, appointed new guardians, and declared its readiness to carry out in all respects the orders of

<sup>1</sup> *Nugent v. Vetzera* (1866), L. R. 2 Eq. 712, per Wood, V.-C.

<sup>2</sup> *Ibid.* pp. 714, 715, per Wood, V.-C.

the Italian Courts with regard to the infant, so far as might be consistent with the laws of England.<sup>1</sup>

The position, however, in England of foreign guardians is a subject on which it is difficult to lay down precise rules, both because in all matters of guardianship the High Court acts mainly on its discretion and with reference to the particular circumstances of each case, and because the later decisions involve a recognition of foreign guardianship not in reality consistent with the doctrine of the earlier cases that the powers of guardians are strictly local.

The authority of a guardian who is not appointed by the Courts of the foreign infant's domicile (*e.g.*, of a guardian appointed by a French Court for an Italian infant) will, it is conceived, not be recognised in England.

RULE 134.<sup>2</sup>—A foreign guardian has, unless interfered with by the Court, control over the person of his ward while in England.

Comment.

An Italian guardian brings his ward, also an Italian, to England. The guardian takes his ward out of England. He acts legally, and does not expose himself to any legal proceedings for removing his ward.

RULE 135.<sup>3</sup>—A foreign guardian cannot dispose of movables situate in England belonging to his ward (?).

Comment.

A French guardian of a French minor sells to *M* goods belonging to such minor which are situate in England. The guardian cannot (*semble*) give a good title to the goods, and by selling them may possibly expose himself to an action for conversion.

<sup>1</sup> *Di Savini v. Lousada* (1870), 18 W. R. 425.

<sup>2</sup> *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704. A foreign guardian cannot exercise in England any powers over his ward which could not be exercised by an English guardian. See language of Lord Cottenham in *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 113, 114; contrast language of Wood, V.-C., L. R. 2 Eq. 714. \*

<sup>3</sup> Story, 504 a. See American cases cited, Story, s. 504 a, note 4, and observations of Wood, V.-C., in *Scott v. Bentley* (1855), 1 K. & J. 281, 284.



(D) LEGITIMACY.<sup>1</sup>

RULE 136.—A child born anywhere in lawful wedlock is legitimate.

## Comment.

If any dispute arises as to the legitimacy of a child ostensibly born in lawful wedlock, it will be found that the matter in dispute is not the soundness of Rule 136, but either the validity of the marriage,<sup>2</sup> or the fact of the child being born in wedlock. The principle itself, expressed in the Rule, is beyond dispute.

RULE 137.—The law of the father's domicile at the time of the birth<sup>3</sup> of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage<sup>4</sup> of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimatio per subsequens matrimonium*).

Case 1.—If *both* the law of the father's domicile at the time of the birth of the child *and* the law of the father's domicile at the time of the subsequent marriage allow of *legitimatio per subsequens matrimonium*, the child becomes, or may become,<sup>5</sup> legitimate on the marriage of the parents.<sup>6</sup>

<sup>1</sup> See Story, ss. 87 a, 93—93 w, 105, 106; Westlake (4th ed.), pp. 96—100; Phillimore, ss. 532—542; Wharton, ss. 240—250; Savigny, Guthrie's transl., s. 380, pp. 302, 308—317. See App., Note 16, "Legitimation."

<sup>2</sup> See as to Validity of Marriage, chap. xxvii., Rules 172, 173, pp. 613—629, *post*.

<sup>3</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621.

<sup>4</sup> *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216; Westlake, ss. 54, 55.

<sup>5</sup> It is not certain that he will become legitimate on the marriage of his parents, since the law of the country where the father is then domiciled may for the purpose of legitimation require something more than the marriage; it may, for example, require that the father should go through some additional ceremony or formality, or that he should not, between the child's birth and the subsequent marriage with the child's mother, have been married to any other woman.

<sup>6</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Vaucher v. Solicitor to Treasury, In re Grove* (1888), 40 Ch. D. (C. A.) 216.

*Case 2.*—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.<sup>1</sup>

*Case 3.*—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.<sup>2</sup>

Provided that a person born out of lawful wedlock cannot be heir to English real estate, nor can anyone, except his issue, inherit English real estate from him.<sup>3</sup>

#### Comment and Illustrations.

According to the law of England, of the Northern States of America, and of all countries governed by the English common law, a child born before the marriage of his parents cannot be legitimated by their subsequent marriage. According to the law of Scotland, of France, and of most countries which have adopted, or have been influenced by, the law of Rome, such a child is or may be legitimated by the subsequent marriage of the parents. These countries, in short, allow what is technically known as *legitimatio per subsequens matrimonium*.<sup>4</sup>

<sup>1</sup> *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Shedden v. Patrick* (1854), 1 Macq. 535; *Munro v. Saunders* (1832), 6 Bli. 468; *Dalhousie v. M'Douall* (1840), 7 Cl. & F. 817; *Munro v. Munro* (1840), 7 Cl. & F. 842.

<sup>2</sup> *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216. As to meaning of "marriage," see chap. xxvii., Rule 172, p. 613, *post*.

<sup>3</sup> *Birtwhistle v. Vardill* (1835), 2 Cl. & F. 571; *In re Don's Estate* (1857), 4 Drew. 194; 27 L. J. Ch. 98.

The principle of this proviso applies (it is submitted) whenever the child is the offspring of a marriage prohibited by the law of England, *e.g.*, the marriage of a widow with her deceased husband's brother. Such a marriage, when celebrated in a country, *e.g.*, Italy, by Italian subjects there domiciled, is valid even in England (*In re Bozzelli's Settlement*, [1902] 1 Ch. 751); but the child of such marriage, though legitimate, cannot be heir to English land. See *Fenton v. Livingstone* (1859), 3 Macq. 497, and compare opinion of J. Westlake, Parliamentary Paper, No. 145, 3rd April, 1876.

<sup>4</sup> "The laws of most of the States on the continent of Europe admit this legitimation generally, though with distinctions in respect of certain illegitimate

This fundamental difference of law has given rise to various questions as to the extra-territorial effect produced on the legitimacy of a child by the marriage of his parents after his birth. Whether, for example, a child born in Scotland is to be considered legitimate in England on the subsequent marriage of his parents in Scotland or England; whether a child born in England of parents domiciled in Scotland becomes legitimate on the marriage of its parents in England or in Scotland; whether regard is to be had to the place of birth or to the place of marriage; and other inquiries of the same kind—have (in consequence of the difference between English and Scotch law) constantly come before the English Courts, or before the House of Lords sitting as a Court of Appeal from Scotland.<sup>1</sup>

After some fluctuation in the decisions, the principle stated in Rule 137 has been well established. The test whether the subsequent marriage of a child's parents can legitimate him is the law of the father's domicile at the time of the child's birth, taken in combination with the law of the father's domicile at the time of the subsequent marriage.

This principle applies to three different cases :—

*Case 1.*—If the law of the country (for example, Scotland) where the father is domiciled (not necessarily where he is resident) at the time of a child's birth, and also of the country (for example, France) where the father is domiciled at the time of the marriage with the child's mother, recognises *legitimatio per subsequens matrimonium*, the child, though born before the marriage

“ children, or in respect of the form of the acknowledgment by the parents. It is  
 “ also the law in the Isle of Man, Guernsey, and Jersey, in Lower Canada,  
 “ St. Lucia, Trinidad, Demerara, Berbice, at the Cape of Good Hope, Ceylon,  
 “ Mauritius,—as well as in North America, in the States of Vermont, Mary-  
 “ land, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri,  
 “ Indiana, and Ohio,—also in Scotland. In Ireland, England, and those of its  
 “ dependencies in the West Indies and North America which have not been  
 “ named, as well as in the other States of North America, legitimation by subse-  
 “ quent marriage is not admitted at all.” Schaeffner, *Entwicklung des inter-  
 nationalen Privatrecht*, p. 49, cited Savigny, Guthrie's transl. (2nd ed.), p. 308.

<sup>1</sup> Most of the decisions on this subject are given by the House of Lords as a Scotch Court of Appeal; but it is conceived that the principles laid down, *e.g.*, in *Uday v. Uday*, may be taken as generally binding, and would be adhered to by the House of Lords when sitting as an English Court. See especially *Vaucher v. Solivertor to Treasury*, *In re Grove* (1888), 40 Ch. D. (C. A.) 216, which determines that the subsequent marriage of a child's parents does not legitimate him if, at the time of the marriage, the father is domiciled in a country the law whereof does not allow of *legitimatio per subsequens matrimonium*.

of his parents, may become legitimate on their subsequent marriage. Thus, where the child's father was domiciled, though not residing, in Scotland at the time of the child's birth in England, it was held that the subsequent marriage of his parents whilst the father retained his Scotch domicile made the child legitimate.<sup>1</sup>

*Case 2.*—If the law of the country (for example, England or New York) where the father is domiciled at the time of the child's birth does not allow of *legitimatio per subsequens matrimonium*, no subsequent marriage will avail to make the child legitimate.

Thus, where an Englishman, domiciled in England, had, while residing in France, a child by a Frenchwoman, herself domiciled in France, it was held that the subsequent marriage of the parents did not legitimate the child.<sup>2</sup> This was a particularly strong case, because the father had, after the birth of the child but before the marriage, acquired a French domicile.

*Case 3.*—If, lastly, the law of the country (for example, England) where the father is domiciled at the time of the subsequent marriage with the child's mother does not allow of *legitimatio per subsequens matrimonium*, the marriage will not avail to make the child legitimate.

Thus, where a Genevese citizen was at the time of the birth of his child domiciled at Geneva, the law whereof allowed of *legitimatio per subsequens matrimonium*, and, having afterwards obtained an English domicile, then married the child's mother, it was held that the subsequent marriage did not legitimate the child.<sup>3</sup> "In my opinion," says Cotton, L. J., "the domicile at birth must give a capacity to the child of being made legitimate; but then the domicile at the time of the marriage, which gives the status, must be domicile in a country which attributes to marriage that effect."<sup>4</sup>

<sup>1</sup> *Munro v. Munro* (1840), 7 Cl. & F. 842.

<sup>2</sup> *Re Wright's Trusts* (1856), 25 L. J. Ch. 621; 2 K. & J. 595.

<sup>3</sup> *Vaucher v. Solicitor to Treasury, In re Grove* (1888), 40 Ch. D. (C. A.) 216. This case is not, it is true, absolutely decisive, for some of the judges took the view that the father was domiciled in England, both at the time of the child's birth and at the time of his marriage with the child's mother. But the very decided expressions of opinion both by Cotton, L. J. (pp. 231—233), and by Fry, L. J. (p. 241), are nearly equivalent to a decision on the point in question.

<sup>4</sup> *Ibid.*, p. 233, judgment of Cotton, L. J. It must be admitted that in some reported cases, e.g., *Re Wright's Trusts* (1856), 2 K. & J. 595, 614, judgment of Page Wood, V.-C.; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Udny v. Udny* (1869), L. R. 1 Sc. Ap. 441, expressions have been used which seemed to imply that judges of authority considered that the effect of a marriage subsequent to a child's birth

The *domicil* of the *mother* is immaterial.

Thus, where a child's mother was at the time of his birth a domiciled Frenchwoman, it was distinctly laid down that "no importance can be attributed to the fact of the mother being a Frenchwoman. A domiciled Englishman having a child before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicil."<sup>1</sup> So, on the other hand, if the father is a domiciled Scotchman, the child's capacity for being legitimated is not affected by the mother being a domiciled Englishwoman.<sup>2</sup>

The *place* of the child's *birth* is immaterial.

It was, indeed, at one time thought that the law of the country where the child was born (not of the father's domicil at the time of the birth) determined the effect of the subsequent marriage on the legitimacy of the child.<sup>3</sup> It is, however, now settled that the place of the birth is immaterial.<sup>4</sup>

The *place* where the *marriage* is *celebrated* is immaterial.

A marriage celebrated in England according to the ritual of the English Church will legitimatise the children of a father domiciled in Scotland, both at the time of their birth and at the time of the subsequent marriage in England with their mother.<sup>5</sup>

The operation of the principle contained in the rule, under the different circumstances to which it may be applied, may be seen from the following illustrations, in each of which *F* is the father, *M* the mother, and *C* the child. It is assumed in each case that the marriage takes place after *C*'s birth. To understand these examples the reader must bear in mind that Scotch law allows,

depends wholly on the domicil of the father at the time of the birth, and that the father's domicil at the time of the marriage is immaterial, but no reported case prior to *Vaucher v. Solicitor to Treasury* required a decision as to the effect to be attributed to the law of the father's domicil at the time of the marriage.

<sup>1</sup> *Re Wright's Trusts* (1856), 2 K. & J. 595, 610, per Page Wood, V.-C.

<sup>2</sup> *Munro v. Munro* (1840), 7 Cl. & F. 842. That the domicil of the mother should have no effect is rather remarkable. From the fact that an illegitimate child derives his domicil of origin from his mother (see Rule 6, clause 2, p. 104, *ante*), it might be inferred that his capacity for legitimation would depend on the law of her domicil.

<sup>3</sup> Compare Story, ss. 93 *u*, 93 *s*.

<sup>4</sup> *Re Wright's Trusts* (1856), 2 K. & J. 595, 614, judgment of Page Wood, V.-C.; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Udny v. Udny* (1869), L. R. 1 Sc. App. 441.

<sup>5</sup> *Munro v. Munro* (1840), 7 Cl. & F. 842.

whilst English law does not allow, *legitimatio per subsequens matrimonium*.

1. *F* and *M* are domiciled in Scotland at the time of *C*'s birth. *C* is born in Scotland. *F* and *M* marry in Scotland whilst domiciled there.

*C* is legitimate.

2. *F* is domiciled in Scotland but *M* is domiciled in England at the time of *C*'s birth. The birth and the marriage take place in Scotland, *F* being domiciled in Scotland and *M* continuing domiciled in England at the time of the marriage.

*C* is legitimate.

3. *F* is domiciled in Scotland, but has resided for a long time, and is residing, in England at the time both of *C*'s birth and of the marriage. *M* is an Englishwoman domiciled in England. The marriage takes place in London, according to the ceremonies of the Church of England.

*C* is legitimate.<sup>1</sup>

4. *F* and *M* are domiciled in England at the time of *C*'s birth. *C*'s birth takes place in Scotland. *F* and *M* marry in England whilst domiciled there.

*C* is illegitimate.

5. *F* is domiciled in England, but *M* is domiciled in Scotland at the time of *C*'s birth. The birth and the marriage both take place in England, *F* being domiciled in England and *M* continuing domiciled in Scotland at the time of the marriage.

*C* is illegitimate.

6. *F* is domiciled in England, but has resided for a long time, and is residing, in Scotland at the time both of *C*'s birth and of the marriage. *M* is an Englishwoman domiciled in England. The marriage takes place in Scotland according to the forms of the Church of Scotland.

*C* is illegitimate.

7. *F* is domiciled in England, but is residing in Scotland at the time of *C*'s birth. *M* is a Scotchwoman domiciled in Scotland. *C* is born in Scotland. After *C*'s birth, but before the marriage with *M*, *F* acquires a Scotch domicile. *F* marries *M* according to the forms of the Church of Scotland whilst domiciled in Scotland.

*C* is illegitimate.<sup>2</sup>

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817. Compare *Shedden v. Patrick* (1854), 1 Macq. 535, 611.

<sup>2</sup> This is (substituting Scotland for France) the state of facts decided upon in *Re Wright's Trusts* (1856), 25 L. J. Ch. 621.

8. *F* is domiciled in Scotland at the time of *C*'s birth, but has long resided in England. *M* is an Englishwoman domiciled in England. *C* is born in England. After *C*'s birth, but before the marriage with *M*, *F* acquires an English domicile. *F* marries *M* whilst domiciled in England.

*C* is illegitimate.<sup>1</sup>

*Proviso.* The proviso, that no one born out of lawful wedlock can inherit English real estate, is a strict application of the principle that rights to immovables are governed by the *lex situs*, that is, by the ordinary law of the country where the land is situate.<sup>2</sup>

The rule of English law is that real property must go to the "heir," and a man must, in order to be an heir, according to English law, fulfil two conditions: First, he must be the eldest living, legitimate son of his father. This condition is fulfilled by a Scotchman who, born of a father domiciled in Scotland, is legitimated by the subsequent marriage of his parents. Secondly, he must be born in lawful wedlock. This condition cannot be fulfilled by a person who is legitimated after his birth. Such a person, therefore, though legitimate, cannot be an English heir, and therefore cannot inherit English land.

On similar grounds he cannot transmit the right to land to his father,<sup>3</sup> or to collateral relations, since, in order to do this, he must in substance establish the very connection between him and his father which would make him, under different circumstances, heir to his father.

That the want of being born in lawful wedlock, and not illegitimacy on the claimant's part, is the true ground for decision in *Birtchistle v. Vardill*,<sup>4</sup> is seen from the answer given by the judges to a question submitted to them by the House of Lords. The inquiry made by their Lordships was in substance whether *C*, who was born before the marriage of his parents, who were domiciled in Scotland, could, in virtue of their subsequent marriage and his legitimation according to Scotch law, be heir to real property in England. Part of the answer was as follows:—

"It appears to us that the answer to the question which your

<sup>1</sup> *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216.

<sup>2</sup> See chap. xxiii., Rule 141, p. 500, *post*.

<sup>3</sup> *Re Don's Estate* (1857), 4 Drew. 194; 27 L. J. Ch. 98.

<sup>4</sup> (1835), 2 Cl. & F. 571.

" Lordships have put must be founded upon this distinction :<sup>1</sup> while " we assume that [C] is the eldest legitimate son of his father, in " England as well as in Scotland, we think that we have also to " consider whether that status, that character, entitles him to the " land in dispute as the heir of that father ; and we think that this " question, inasmuch as it regards real property situated in England, " must be decided according to those rules which govern the descent " of real property in that country, without the least regard to those " rules which govern the descent of real property in Scotland. We " have, therefore, considered whether, by the law of England, a " man is the heir of English land, merely because he is the eldest " legitimate son of his father. We are of opinion that these " circumstances are not sufficient of themselves, but that we must " look further, and ascertain whether he was born within the state " of lawful matrimony ; because, by the law of England, that " circumstance is essential to heirship ; and that is a rule, not of " a personal nature, but of that class which, if I<sup>2</sup> may use the " expression, is sown in the land, springs out of it, and cannot, " according to the law of England, be abrogated or destroyed by " any foreign rule or law whatsoever. It is this circumstance " which in my opinion dictates the answer which we must give to " your Lordships' question ; viz., that, in selecting the heir for " English inheritance, we must inquire only who is that heir by the " local law." <sup>3</sup>

*Limitations to proviso.—First.* A person legitimate under Rule 137 in one country is, according to the law of England, legitimate everywhere.<sup>4</sup> What the proviso lays down is in effect that a person, in order to be an English "heir," must be something more than legitimate. It does not (as it is often supposed to do) lay down that a man may be legitimate, *e.g.*, in Scotland, but illegitimate in England. Thus, in a case with regard to legacy duty, the question arose what duty was payable by the daughters of a British subject domiciled in France, the daughters having been legitimated by the marriage of their parents after their birth. It was held that they were not strangers in blood to their father,

<sup>1</sup> *I.e.*, the distinction between " real and personal status " (statutes?).

<sup>2</sup> The opinion of the judges was delivered by Alexander, C. B.

<sup>3</sup> *Birtwhistle v. Vardill* (1835), 2 Cl. & F. 571, 576, 577.

<sup>4</sup> *Re Don's Estate* (1857), 27 L. J. Ch. 98 ; 4 Drew. 194. See, especially, judgment of Kindersley, V.-C., 27 L. J. Ch. 100 ; and *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266 ; *In re Grey's Trusts*, [1892] 3 Ch. 88 ; *In re Andros* (1883), 24 Ch. D. 637.



and ought to pay only the 1*l*. per cent. duty due from children, and the law was thus stated :—

“If . . . the daughters of the testator are legitimate by the law of France, and must therefore in this country be considered as having the status of children, it is difficult to see how, in any sense, they can be ‘strangers in blood.’ Where the Legacy Duty Act uses these words, it is as a description of the status of the person.

“In *Birtwhistle v. Vardill*<sup>1</sup> it was admitted that the claimant had in England the status of the eldest legitimate son of his father; but inasmuch as he claimed to be heir, and as such entitled to inherit land in England, his status of eldest legitimate son was not enough, and he was held bound to prove that he was ‘heir’ according to the law of the country in which the land was situated. As he was unable to prove that he was the eldest son of his father born in wedlock, he failed to show that he filled the character of heir, though he did establish his status of eldest legitimate son.

“It is said that the words ‘stranger in blood’ include the status known to English law as applied to English persons; but this will is that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of France, which, according to *Birtwhistle v. Vardill*, constitutes their English status.

“If, in *Birtwhistle v. Vardill*, the claimant’s status was that of eldest legitimate son of his father, it would be absurd to say that he was a stranger in blood.

“The status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English and their father domiciled in England, they would have been illegitimate.”<sup>2</sup>

*Secondly.* The proviso is, it will be observed, strictly confined to “real estate,” which descends to the heir. It has clearly no application to movables;<sup>3</sup> and the principle of the proviso has almost certainly no application to “chattels real,”<sup>4</sup> *e.g.*, leases for

<sup>1</sup> (1840), 7 Cl. & F. 895.

<sup>2</sup> *Skottowe v. Young* (1871), L. R. 11 Eq. 474, 477, per Stuart, V.-C.

<sup>3</sup> As to succession to movables, see chap. xxxi., p. 664, *post*.

<sup>4</sup> See *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123; *Duncan v. Lawson* (1889), 41 Ch. D. 394.

years, which pass, not to the "heir," but to the personal representative of the deceased.

*F*, a Scotchman domiciled in Scotland, has, whilst unmarried, a child, *C*, by *M*. *F* afterwards, whilst still domiciled in Scotland, marries *M*, and after *M*'s death dies intestate, possessed of—

- (a) a freehold estate in England ;
- (b) money and furniture situate in England ;
- (c) a house in London held on a lease of ninety-nine years (personal estate).

*C*, the child, *does not* inherit the freehold estate, since he is not *F*'s "heir" according to the law of England.<sup>1</sup>

*C* succeeds to the money, furniture, &c., or the share thereof to which he may be entitled by the law of Scotland.<sup>2</sup>

*C* probably succeeds to the house in London as *F*'s next of kin.<sup>3</sup>

*Thirdly.* The proviso applies in strictness only to the *inheritance* of real estate in the case of *intestacy*; it does not apply to the devolution of English real estate under a will. "The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country,<sup>4</sup> those children are legitimate whose legitimacy is established by the law of the father's domicile."<sup>5</sup> This principle, which is really one with regard to the interpretation of a will, is in itself clearly applicable to a devise of English realty and has been so applied. It appears, "upon examination of *Doe v. Vardill*<sup>6</sup> that the rule there laid down relates only to the case of descent of land upon an intestacy, and does not affect the case of a devise in a will to children."<sup>7</sup> Nor does there appear to be any clear reason for

<sup>1</sup> Rule 137, p. 479, *ante*.

<sup>2</sup> See chap. xxxi., Rule 183, p. 664, *post*.

<sup>3</sup> See *Fryke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541; *Duncan v. Lawson* (1889), 41 Ch. D. 394; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123, compared with *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *In re Grey's Trusts*, [1892] 3 Ch. 88. And see further discussion of the question. One point may be regarded as clear: the domicile of *F* at his death does not affect one way or another *C*'s right to succeed to *F*'s English leaseholds. (*Duncan v. Lawson*, *supra*.)

<sup>4</sup> *I.e.*, in effect by the principle contained in Rule 137, p. 479, *ante*.

<sup>5</sup> *In re Andros* (1883), 24 Ch. D. 637, 642, judgment of Kay, J.

<sup>6</sup> (1835), 2 Cl. & F. 571; (1840), 7 Cl. & F. 895.

<sup>7</sup> *In re Grey's Trusts*, [1892] 3 Ch. 88, 93, judgment of Stirling, J.

applying, in this instance, to a settlement a rule of interpretation different from that applied to a will.<sup>1</sup>

*Questions suggested by Rule.*—The whole Rule, including the proviso, leaves open two questions which cannot be answered with absolute certainty:—

*Question 1.*—*Can a legitimated person succeed to the English chattels real of an intestate as next of kin under the Statute of Distributions?*

The answer to this question depends on drawing the right inference from the following propositions:—

*First.* A person born out of lawful wedlock cannot inherit English realty as heir.<sup>2</sup>

*Secondly.* Chattels real are not “movables,”<sup>3</sup> nor are they “realty”; they are personal estate, and devolve therefore, in case of intestacy, in accordance with the provisions of the Statute of Distributions, and not in accordance with the rules governing the devolution of movables under the law of the intestate’s domicile: thus, if an intestate dies domiciled in Scotland, leaving leaseholds in England, the leaseholds devolve in accordance with the English Statute of Distributions.<sup>4</sup>

*Thirdly.* A person who, though born out of lawful wedlock, is legitimated according to the law of his father’s domicile, both at the time of such person’s birth and at the time of the subsequent marriage<sup>5</sup> of his parents, is in England the legitimate child of his father.<sup>6</sup>

<sup>1</sup> Though the word “child,” or the like, may, when used in an English will or settlement, be held to include any person whom English Courts hold to be legitimate under the rules of private international law recognised by them (*i.e.*, under Rule 137, p. 479, *ante*), yet it must always be remembered that this principle is merely a rule of interpretation, and that the question whether a testator or settlor does or does not mean by the word “child” to designate not only a child born in lawful wedlock, but also a child born out of lawful wedlock but legitimated by the subsequent marriage of his parents, must in every case depend upon the whole tenour of the document.

<sup>2</sup> *Birtchistle v. Vardill* (1840), 7 Cl. & F. 895; *Re Don’s Estate* (1857), 4 Drew. 194. Compare *In re Grey’s Trusts*, [1892] 3 Ch. 88.

<sup>3</sup> *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541.

<sup>4</sup> *Duncan v. Lawson* (1889), 41 Ch. D. 394.

<sup>5</sup> See Rule 137, p. 479, *ante*.

<sup>6</sup> *In re Goodman’s Trusts* (1881), 17 Ch. D. (C. A.) 266, 294, 295, judgment of Cotton, L. J.; pp. 298–300, judgment of James, L. J. But compare *In re Fergusson’s Will*, [1902] 1 Ch. 483. In this case it was held that the meaning of “next of kin” in an English will was simply a matter of interpretation, and

*Fourthly.* Such a legitimated person is his father's legitimate child under the Statute of Distributions, and as such entitled to succeed as next of kin to his father's goods, though his father dies domiciled in England.<sup>1</sup>

The right inference from these premises is (it is submitted) that a legitimated person is entitled to succeed to the English chattels real of an intestate as next of kin under the Statute of Distributions, and this whether the domicile of the deceased be foreign or English.<sup>2</sup>

*Question 2.—What is the effect, according to English law, of a person being made legitimate by the authority of a foreign sovereign?*<sup>3</sup>

Suppose that a person born illegitimate is legitimated by a decree of the Czar of Russia, will such a person be held legitimate here?

There is no English authority on the subject. The most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicile of such person's father at the time of his birth and at the time when the decree was issued. Suppose, that is to say, that the child's father were domiciled in Russia at the time of the child's birth and at the date of the decree, then the decree would have the effect of making the child legitimate in England. If, on the other hand, the father were domiciled in England, either at the time of the birth or at the date of the decree, the child would apparently not be legitimated in England thereby.

that, though the legatees were Germans domiciled in Germany, this was no ground for interpreting the term "next of kin" in accordance with German rather than English law. It was admitted that the status of such legatees depended on German law.

<sup>1</sup> See note 6, p. 489.

<sup>2</sup> In an elaborate note on this question (Foote, pp. 232—237) Mr. Foote arrives, on the whole, at the conclusion here put forward as probable, that a legitimated person can succeed as next of kin to English chattels real.

<sup>3</sup> See Bar, s. 198, p. 442; Phillimore, s. 542.

(E) LUNATIC AND CURATOR, OR COMMITTEE.<sup>1</sup>

RULE 138.<sup>2</sup>—A person appointed by a foreign decree or commission the curator or committee of a lunatic resident in a foreign country (which person is hereinafter called a foreign curator) does not acquire the right, as such curator, to control the person or deal with the property of the lunatic in England (?).<sup>3</sup>

## Comment.

A lunatic was resident in Jamaica, where a commission of lunacy was issued against him. He was brought over by one of his committees to England. A relative in England petitioned for a new commission. It was contended that the Jamaica commission was in force and sufficient. It was held, however, that a new commission was needed.

"The commission now existing in Jamaica," it was laid down, "is no reason why a commission should not issue here. On the contrary, it is evidence of the absolute necessity that there should be somebody authorised to deal with the person and estate of this lunatic. While the lunatic is here, no Court will have any authority over him or his property unless a commission is taken out."<sup>4</sup>

Lord Eldon's words contain (it is submitted, though with con-

<sup>1</sup> See Westlake (4th ed.), pp. 45—49; Foote, pp. 82—87; Phillimore, ss. 563, 564; *In re Houstoun* (1826), 1 Russ. 312; *Re Elias* (1851), 3 Mac. & G. 234; *Newton v. Manning* (1849), 1 Mac. & G. 362; *Scott v. Bentley* (1855), 1 K. & J. 281; *Re Garnier* (1872), L. R. 13 Eq. 532; *Mackie v. Darling* (1871), L. R. 12 Eq. 319; *In re Stark* (1850), 2 Mac. & G. 174; *In re Sottomaior* (1874), L. R. 9 Ch. 677. Compare *In re Barlow's Will* (1887), 36 Ch. D. (C. A.) 287. In this case, however, the person who, under the New South Wales Lunacy Act, managed the property of lunatic patients as a "Master in Lunacy," did not in strictness represent the lunatic under the law of New South Wales.

<sup>2</sup> *In re Houstoun* (1826), 1 Russ. 312; *New York Security and Trust Co. v. Keyser*, [1901] 1 Ch. 666.

<sup>3</sup> This must be taken subject to the Lunacy Act, 1890, s. 131, under which the powers of management and administration of the estates of persons found lunatic in England are extended to Ireland and Scotland, of persons found lunatic in Ireland are extended to England and Scotland, and of persons found lunatic in Scotland are extended to England and Ireland. Compare Wood-Renton, Lunacy, p. 442.

<sup>4</sup> *In re Houstoun* (1826), 1 Russ. 312, per Eldon, C.

siderable hesitation) what is still in principle the law of England.<sup>1</sup> The application of this principle is limited by two considerations. First, our Courts, in dealing with the rights to be conceded to a foreign curator in respect either of the personal freedom or the property of a lunatic, exercise a wide discretion, and act mainly with a view to the benefit of a lunatic. Secondly, our Courts show an increasingly strong tendency to recognise, if not absolutely to enforce, the authority of a foreign curator, especially when the curator is appointed under the law of the lunatic's domicile.

*Question.*—*Can a foreign curator sue here for money due to the lunatic?*

A person residing in Scotland, there became of unsound mind, and *A* was appointed his *curator bonis* according to Scotch law. It was held that *A* could sue in this country for money due to the lunatic, and give a good discharge for it.<sup>2</sup>

The principle of this decision is thus explained in the judgment:

“In *Newton v. Manning*<sup>3</sup> Lord Cottenham is reported to have said that, if a person invest himself abroad with full right to receive the property of a person found lunatic there, when he applies to the jurisdiction of this country he may obtain the lunatic's property. As a party abroad can assign his rights, I do not see why a Court of competent jurisdiction should not transfer them when he becomes a lunatic.”<sup>4</sup>

This doctrine may appear inconsistent with the general principle that a foreign curator has not, as such, authority in this country. His right to sue for money due to the lunatic and his want of authority as curator may, perhaps, be reconciled in the following manner: The status of a foreign curator does not, as such, give him control over a lunatic, or his property, in England. If, how-

<sup>1</sup> From this Westlake, it must be noted, dissents. “The better view,” he writes, “is that guardians and committees, deriving their office from the personal law or jurisdiction of the minors or lunatics, have authority over such minors or lunatics in England, and that therefore the English Court ought not in such cases to appoint guardians or committees of the person without special cause”: p. 46. In support of this conclusion, for which there is much to be said, he cites the language of Brougham in *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 96, 97; and of Campbell, pp. 121, 122. Contrast, however, *Beattie v. Johnstone* (1841), 1 Ph. 17 (language of Cottenham); and *Johnstone v. Beattie* (1843), 10 Cl. & F. pp. 86—90 (language of Lyndhurst), pp. 112—117 (Cottenham), and pp. 147, 148 (Langdale).

<sup>2</sup> See *Scott v. Bentley* (1855), 1 K. & J. 281; 24 L. J. Ch. 244.

<sup>3</sup> (1849), 1 Mac. & G. 362.

<sup>4</sup> *Scott v. Bentley* (1855), 1 K. & J. 281, 284, per Page Wood, V.-C.

ever, the foreign curator is appointed under the law of a lunatic's domicile (but not otherwise), and has by such appointment become, under the law of such foreign country, the owner for certain purposes of the lunatic's movable property, he may enforce his right with respect to it in an English Court, just as he might had he purchased the property or were an assignee in bankruptcy under the law of the owner's domicile.<sup>1</sup> The right to sue is then acquired by a transaction taking place wholly under the law of a foreign country, and, as such, enforceable here.<sup>2</sup>

RULE 139.—If a foreign curator applies to the Court to have the person of the lunatic delivered to him, or for the payment to him of money belonging to the lunatic, the Court may in its discretion either grant or refuse the application.<sup>3</sup>

“The Court” in this Rule includes any Court or person having the jurisdiction of a Judge in Lunacy.<sup>4</sup>

#### Comment and Illustrations.

The tendency of our Courts, at any rate, to recognise the status of a foreign curator has, as already pointed out, become more and more marked.

<sup>1</sup> See Rule 110, p. 430, *ante*.

<sup>2</sup> See *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Thiery v. Chalmers, Guthrie & Co.*, [1900] 1 Ch. 80; with which contrast *New York Security, &c. Co. v. Keyser*, [1901] 1 Ch. 666, where it is held that the foreign committee of a man domiciled in England, though resident in a foreign country where he is found lunatic, cannot as of right recover the lunatic's movable property in this country.

<sup>3</sup> See, especially, the Lunacy Act, 1890 (53 Vict. c. 5), s. 134.

<sup>4</sup> The explanation of the term “the Court” is added because, on the one hand, the jurisdiction of the Lord Chancellor, of the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of persons and estates of idiots, lunatics and persons of unsound mind, is not transferred to the High Court (Judicature Act, 1873, s. 17, sub-s. (3)), and, on the other, the powers of a Judge in Lunacy under the Lunacy Act, 1890, do not belong to the judges of the High Court as such (see *In re De Linden*, [1897] 1 Ch. 453, 457, judgment of Stirling, J.), whilst a Master in Lunacy may in many respects exercise the jurisdiction of a Judge in Lunacy, subject to an appeal to the Judge in Lunacy: Lunacy Act, 1891, s. 27, sub-s. (1), and Rules in Lunacy, 1892, r. 11. But the judges of the Court of Appeal have in fact the jurisdiction of Judges in Lunacy under the Lunacy Act, 1890, s. 108, sub-s. (1). See Wood-Renton, Lunacy, p. 333.

Hence, occasionally at least, a foreign curator who acts under authority given him by the law of the lunatic's foreign domicile has been able to obtain from the Court control of the lunatic's person, as in the following case: A Portuguese gentleman is domiciled in Portugal. His property is mainly in Portugal. He is resident in England, and has been for some years confined there as a lunatic. Proceedings in lunacy are taken by his wife in Portugal, and she, under the law of Portugal, is in that country his guardian and the administratrix of his estate (foreign curator). On an application from a Portuguese Court he is found a lunatic in England. Liberty is given by the Court for the removal, by the committee, of the lunatic to Portugal to be delivered to his wife, and the committee is directed to pay over moneys of the lunatic in England to the solicitor of his wife.<sup>1</sup>

Hence, too, the foreign curator may often obtain from the Court control of the lunatic's movables, either independently of any statute, or under the Lunacy Act, 1890, s. 134, which enables the Court to give a foreign curator control of stock standing in the name of the lunatic.

In considering this point it is convenient to set aside cases where a foreign curator may base his claim to a lunatic's movables on the ground that the curator, having been appointed under the law of the lunatic's domicile, has for certain purposes become owner of the lunatic's movables.<sup>2</sup> It may be convenient also to distinguish cases in which a foreign curator applies for the transference to him of the lunatic's movable property independently of the provisions of the Lunacy Act, 1890, s. 134, and cases in which his application is based upon this enactment.

The following is an illustration of the first class of cases:—

An Englishman while resident in France is found a lunatic under French law, and a curator is appointed by the proper French Court. A fund in this country amounting to 900*l.*, to which the lunatic is entitled, is paid into Court here under the Trustee Act, 1893, s. 42. Upon a petition by the curator for payment out of Court to him of the said 900*l.*, an order is made by the Court in its discretion for retaining the said 900*l.* and the payment of the dividends only to the curator.<sup>3</sup>

<sup>1</sup> *In re Sottomaior* (1874), L. R. 9 Ch. 677, 679; *In re Burbidge*, [1902] 1 Ch. (C. A.) 426.

<sup>2</sup> See p. 493, *ante*.

<sup>3</sup> *In re Garnier* (1872), L. R. 13 Eq. 532. The payment into Court is in the particular case made under the Trustees Relief Act, 1847 (10 & 11 Vict. c. 96), now



Consider now the Lunacy Act, 1890, s. 134, and cases which illustrate it. The section runs (except as to the words in brackets) in the following terms:—

“Where any stock is standing in the name of or vested in a person residing out of [England<sup>1</sup>], the Judge in Lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof [*i.e.*, a foreign curator<sup>2</sup>], according to the law of the place where he is residing, may [in its discretion<sup>3</sup>] order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed [*i.e.*, the foreign curator<sup>2</sup>] or otherwise, and also to receive and pay over the dividends thereof, as the judge thinks fit.”

As to this enactment, the following points are noticeable:—

The power of the Court<sup>4</sup> is, as to cases within this section, in the strictest sense discretionary; whilst the Court cannot act under the enactment in any case in which its requirements are not complied with, a foreign curator cannot, because its requirements are complied with, claim as of right that the Court should act under it. To which may be added that, provided the lunatic is resident out of England, the Court's power under this section in no sense depends upon his domicile.

The term “stock” is used in a very wide sense.<sup>5</sup>

The word “vested,” in regard to the curator, is also used in a wide sense, and includes the right to obtain and deal with, without being actual owner of, the lunatic's personal estate.

The following are illustrations of the operation of the enactment:—

A Spaniard, born in Spain, has acquired a domicile and is domi-

repealed. Compare *In re Knight*, [1898] 1 Ch. (C. A.) 257. See also *In re De Linden*, [1897] 1 Ch. 453, where a fund standing in England to the account of a German lunatic is paid over, under the directions of the Court, to a German tribunal, which stands in the position of a foreign curator. In this instance the lunatic was a ward of the German Court, both resident and domiciled in Germany.

<sup>1</sup> “England” substituted for “the jurisdiction of the High Court.”

<sup>2</sup> Added for the sake of elucidation.

<sup>3</sup> These words give the effect of *In re Knight*, [1898] 1 Ch. (C. A.) 257, 260, 261.

<sup>4</sup> See Rule 139, p. 493, *ante*.

<sup>5</sup> “‘Stock’ includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854”: Lunacy Act, 1890 (53 Vict. c. 5), s. 341.

ciled in New York. He resides, and has for many years resided, in France. He is declared lunatic by a French Court. A French curator is appointed. An application is made by the curator for an order transferring securities of the lunatic to the French curator. The order is, as a matter of discretion, granted.<sup>1</sup>

A lady residing in Victoria is declared lunatic by the Supreme Court sitting in Lunacy, and the Master in Lunacy is appointed to manage her property, which consists of English stock standing in her name. The English Court is petitioned on behalf of the Master to transfer such stock into his name. The word "vested" in sect 134 includes the right to obtain and deal with a lunatic's personal estate without being actual owner thereof. The Court in its discretion orders the transfer of the stock into the name of the Victorian Master in Lunacy.<sup>2</sup>

A lady resident in New South Wales is detained there in a lunatic asylum. She has never been regularly found a lunatic, but is, under the New South Wales Lunacy Act, "a lunatic patient." Under the Act the Master in Lunacy of New South Wales has the management of the property of a lunatic patient, and may sue for and receive the debts due to a lunatic patient, but the patient's property is not vested in him. The lady is absolutely entitled to a fund in England in the hands of trustees, and also to an income of 30% a year. The Master, in effect as foreign curator, applies to the Court to have the fund paid over to him. The Court, in its discretion, declines to order the fund to be paid over to the Master, but directs the payment of the income to him.<sup>3</sup>

It may be well to remind the reader that no foreign curator has any authority, by virtue of his foreign appointment, with regard to English immovables.<sup>4</sup>

<sup>1</sup> *In re De Larragoiti*, [1907] 2 Ch. (C. A.) 14.

<sup>2</sup> *In re Brown*, [1895] 2 Ch. (C. A.) 666.

<sup>3</sup> *In re Barlow's Will* (1887), 33 Ch. D. (C. A.) 287. The ground for not paying over the fund was apparently that the patient had not been found a lunatic, and her property was not vested in the Master.

<sup>4</sup> "No guardian, curator, committee of the estate, or assignee in bankruptcy, "either appointed by a foreign jurisdiction or holding the office by virtue of a "foreign law, has any authority with regard to the English real estate of his "minor, lunatic, or bankrupt": Westlake, s. 166, p. 207; *Grimwood v. Bartels* (1877), 46 L. J. Ch. 788; *Waite v. Bingley* (1882), 21 Ch. D. 674. There is a limited exception to this statement as to a curator under the Lunacy Act, 1890, s. 131. See p. 491, n. 3, *ante*.

## CHAPTER XXII.

### NATURE OF PROPERTY.<sup>1</sup>

RULE 140.<sup>2</sup>—The law of a country where a thing is situate (*lex situs*) determines whether

(1) the thing itself, or

(2) any right, obligation, or document connected with the thing,

is to be considered an immovable or a movable.

#### Comment.

Whether a given thing is in its nature a movable or an immovable, *i.e.*, whether it can in fact be moved or not, is manifestly a matter quite independent of any legal rule. A law, however, may determine that a thing in its nature movable shall, for some or for all legal purposes, be subject to the rules generally applicable to immovables, or that a thing in its nature immovable shall, for some or all legal purposes, be subject to the rules applicable to movables. In this sense, and in this sense alone, law can determine whether a given thing shall be treated as a movable or as an immovable. Thus, the law of England can determine, as in fact it does, that title deeds shall be considered as part of the real estate, and descend to the heir, or, in other words, that title deeds shall in some respects be considered or treated as immovables. The only law which can effectively determine whether subjects of property shall be treated as movables or immovables is the law of the country where a given piece of property is in fact situate. Law, as already pointed out, deals in reality with rights; and the law of the country where a given tangible thing is in fact located can determine whether the rights over such thing, *e.g.*, land, or obligations connected with it, or the documents which embody such

<sup>1</sup> Story, s. 447; Nelson, pp. 147, 148. Compare for different views on the subject, Bar (Gillespie's transl., 2nd ed.), s. 229, p. 505.

<sup>2</sup> *Chatfield v. Berchtoldt* (1872), L. R. 7 Ch. 192; *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *Ex parte Rucker* (1834), 3 Dea. & Ch. 704; *De Fogassieras v. Duport* (2) (1881), 11 L. R. Ir. 123; *Duncan v. Lawson* (1889), 41 Ch. D. 394; *Monteith v. Monteith's Trustees* (1882), Ct. Sess. Cas. 4th ser. ix. 982.

rights or obligations, shall be treated as movables or immovables. Thus, title deeds, as already pointed out, are in their nature movables, but title deeds in regard to land in England are treated as appurtenant to the land to which they belong. So a rent-charge on lands in England *pur autre vie* is for some purposes made personal estate by English law without being strictly treated as a movable.<sup>1</sup> And English Courts admit the right of other countries to determine whether property within their limits comes within the class of movables or immovables. When slavery existed in Jamaica, the slaves on the estate were reckoned appurtenant to the land, and have been held by our Courts to pass under a devise of realty in Jamaica.<sup>2</sup> Heritable bonds,<sup>3</sup> again, in so far as they are treated by the law of Scotland as realty or immovables, are recognised as immovables by English Courts.<sup>4</sup> The last example is specially noticeable in relation to our Rule; it shows that it is the *lex situs* which determines not only the nature of a thing, but also of rights, obligations, or documents connected with a thing. A heritable bond may itself be deposited in a bank in England, but it is Scotch law—the *lex situs* of the land on which the bond imposes a charge—that determines the character of the bond. If this be borne in mind, the language of Story, which, if carelessly read, might be misunderstood, gives a correct view of the case. “In addition,” he writes, “to these [*i.e.*, lands, houses, &c.], “which may be deemed universally to partake of the nature of “immovables, or (as the common law phrase is) to savour of the “realty, all other things, though movable in their nature, which “by the local law are deemed immovables, are in like manner “governed by the local law. For every nation having authority

<sup>1</sup> *Chatfield v. Berchtoldt* (1872), L. R. 7 Ch. 192.

<sup>2</sup> *Ex parte Rucker* (1834), 3 Dea. & Ch. 704.

<sup>3</sup> “A ‘heritable bond’ is a bond for a sum of money, to which is joined, for “the creditor’s further security, a conveyance of land or of heritage, to be held “by the creditor in security of the debt.” See “Heritable Bond,” Bell’s Dictionary of the Law of Scotland (ed. of 1882). See, however, the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117, whereby heritable bonds are now made, for most purposes, part of movable estate.

<sup>4</sup> *In re Fitzgerald*, [1904] 1 Ch. (C. A.) 573; *Johnstone v. Baker* (1817), 4 Madd. 474, n.; *Jerningham v. Herbert* (1829), 4 Russ. 388, 395; *Allen v. Anderson* (1846), 5 Hare, 163.

So, if a debt secured by a mortgage of land in a foreign country is, under the law of that country, an immovable, it should (*semble*) be treated as an immovable by English Courts. See *Lawson v. Commissioners of Inland Revenue* (1896), 2 Ir. R. 418; *W. N.* (1896) pp. 145, 148, judgment of Pallets, C. B.

“ to prescribe rules for the disposition and arrangement of all the  
“ property within its own territory, may impress upon it any char-  
“ acter which it shall choose; and no other nation can impugn or  
“ vary that character. So that the question, in all these cases, is  
“ not so much what are, or ought to be deemed *ex sua natura*,  
“ movables or not, as what are deemed so by the law of the place  
“ where they are situated. If they are there deemed part of the  
“ land, or annexed (as the common law would say) to the soil or  
“ freehold, they must be so treated in every place in which any  
“ controversy shall arise respecting their nature and character.  
“ In other words, in order to ascertain what is immovable or real  
“ property or not, we must resort to the *lex loci rei sitæ*.”<sup>1</sup> And  
the principle conversely applies to immovables which, by the *lex*  
*situs*, are treated as movables.

<sup>1</sup> Story, s. 447.

## CHAPTER XXIII.

### IMMOVABLES.<sup>1</sup>

RULE 141.<sup>1</sup>—All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*).

#### Comment.

“The general principle of the common law is, that the laws of the place, where such [immovable] property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them.”<sup>2</sup> “The common law has avoided all . . . difficulties by a simple and uniform test. It declares that the law of the *situs* shall exclusively govern in regard to all rights, interests, and titles, in and to immovable property. Of course it cuts down all attempts to introduce all foreign laws, whether they respect persons or things, or give or withhold the capacity to acquire or to dispose of immovable property.”<sup>3</sup> “All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*.”<sup>4</sup> The general principle thus enunciated by Story and by Westlake is beyond dispute, and applies to rights of every description.<sup>5</sup>

<sup>1</sup> Story, chap. x., ss. 424—463 a; Westlake, chap. viii., pp. 202—218; Foote (3rd ed.), chap. vi., pp. 200—231; Nelson, pp. 142—148; Wharton, ss. 273—296.

As to jurisdiction in respect to immovables, see Rule 39, p. 201, *ante*, Rule 81, p. 357, *ante*, and Rule 85, p. 378, *ante*.

<sup>2</sup> Story, s. 424. Story's statements with regard to the rules of the common law as regards the conflict of laws may be considered to some extent authoritative.

<sup>3</sup> Story, s. 463.

<sup>4</sup> Westlake (4th ed.), p. 203.

<sup>5</sup> As English Courts have in general no jurisdiction to adjudicate upon the title to or the right to the possession of foreign land (see Rule 39, p. 201, *ante*), the cases with regard to land which come before them must in general have reference to land in England. But this is not invariably the case. (See p. 203, *ante*.)

Rule 141 applies in principle not only to English, but also to foreign, immovables (land), in so far as it may happen (which is not often the case<sup>1</sup>) that English Courts are called upon to determine rights over foreign land, or (what is more likely) of money in England which represents foreign land. Their decision must be governed by the *lex situs*—i.e., the law of the country (e.g., France) where the land is situate. But it must be remembered that in this Digest the *lex situs*, or law of France, means not necessarily the territorial law of France, but any law which the French Courts would apply to the decision of the particular case<sup>2</sup> which might under certain circumstances be the local law of some other country, e.g., of England.<sup>3</sup> In truth an English Court in the rare cases when it determines rights in respect of foreign land follows the *lex situs* almost of necessity. The sovereign of the country where land is situate has absolute control over the land within his dominions: he alone can bestow effective rights over it; his Courts alone are, as a rule, entitled to exercise jurisdiction over such land. If English Courts were to determine rights to land, e.g. in Italy, by any other law than the *lex situs*, our tribunals would, in the first place, be guilty of an indirect encroachment upon the rights of the sovereign of Italy over Italian land,<sup>4</sup> and would, in the second place, often be guilty of a refusal to recognise rights duly acquired under the law of a foreign country.<sup>5</sup>

*Capacity.*<sup>6</sup>—Hence a person's *capacity* to alienate an immovable *inter vivos*,<sup>7</sup> or to make a contract with regard to an immovable, or to devise<sup>8</sup> an immovable, or to acquire or to succeed<sup>9</sup> to an immovable, is governed by the *lex situs*.

<sup>1</sup> See Rule 89, p. 201, *ante*.

<sup>2</sup> See pp. 69, 79—81, especially p. 81, note 2, *ante*.

<sup>3</sup> See Sewell, *Outline of French Law as affecting British Subjects* (1897), p. 113; and Vincent, *Dict. du Droit Int. Privé*, p. 289.

<sup>4</sup> See General Principle No. II. (C), p. 34, *ante*.

<sup>5</sup> See General Principle No. I., p. 23, *ante*. It should be remembered that marriage, even where there is a marriage contract, almost always is, as between husband and wife, an assignment of property, and an assignment of land is always subject to the *lex situs*.

<sup>6</sup> See Illustrations 1—4, p. 506, *post*.

<sup>7</sup> Story, ss. 431—463. Compare Nelson, p. 147: and see *Sell v. Miller*, 14 Iowa, N. S. 331 (Am.).

<sup>8</sup> *Ibid.* Compare *In re Hernando* (1884), 27 Ch. D. 284.

<sup>9</sup> *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895; *Re Don's Estate* (1857), 4 Drew. 194; *Fenton v. Livingstone* (1859), 3 Macq. 497; *Duncan v. Lawson* (1889), 41 Ch. D. 394.

“ If a person is incapable, from any . . . circumstance, of transferring his immovable property by the law of the *situs*, his transfer will be held invalid, although by the law of his domicile no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile. This is the silent but irresistible result of the principle adopted by the common law, which has no admitted exception.”<sup>1</sup>

“ It may be laid down as a general principle of the common law, that a party must have a capacity to take according to the law of the *situs*; otherwise he will be excluded from all ownership. Thus, if the laws of a country exclude aliens from holding lands, either by succession, or by purchase, or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicile. On the other hand, if by the local law aliens may take and hold lands, it is wholly immaterial what may be the law of their own domicile, either of origin or of choice.”<sup>2</sup>

*Rights and Formalities of Alienation and of Contract.*<sup>3</sup>—So, again, the right to alienate an immovable, and the modes and formalities of alienation<sup>4</sup> of an immovable *inter vivos*, and the restrictions (if any) imposed upon such alienation, are governed by the *lex situs*. So also, apparently, are the formalities requisite for any mere contract with regard to an immovable. On this last point it is necessary to speak with considerable hesitation. The language of authors such as Westlake or Story<sup>5</sup> certainly suggests that every question with regard to an immovable, and therefore the formal validity of a contract having reference to land, is governed by the *lex situs*. No reported case, moreover, it is submitted, contradicts this conclusion, and *Adams v. Clutterbuck*<sup>6</sup> is in its favour.

But the expressions of Westlake and Story will be found, when carefully examined, to apply to forms of alienation or conveyance, and do not of necessity apply to the form of a contract. The doctrine, moreover, of both these writers, that the formal validity of a

<sup>1</sup> Story, s. 431.

<sup>2</sup> Story, s. 430.

<sup>3</sup> See Illustrations 5—9, pp. 506, 507, *post*.

<sup>4</sup> Story, s. 424; *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403; *In re Hernando* (1884), 27 Ch. D. 284.

<sup>5</sup> See p. 500, *ante*.

<sup>6</sup> 10 Q. B. D. 403.



contract is determined by the law of the country where a contract is made (*lex loci contractus*), is stated in terms broad enough to cover<sup>1</sup> a contract in relation to immovables or land, whilst *Adams v. Clutterbuck*<sup>2</sup> relates to a conveyance or alienation of land, or at any rate to a contract forming part of a conveyance.

Here we reach the root of the difficulty. Contracts with regard to land usually form part of an instrument which is meant to convey or alienate land or an interest in land, but the form of such an instrument is admittedly determined by the law of the country where the land is situate (*lex situs*). The question, therefore, whether a contract with regard to an immovable is or is not, as to its form, governed by the *lex situs*, can arise only when the contract is not intended to be a conveyance or alienation of the land; as, for example, where *X* agrees in England with *A* that he will, six months after the date of the agreement, hire a house in Paris for *A*, or where *X* agrees with *A* in France that he will, six months after the date of the agreement, let a music hall in London to *A*. In these and similar instances there is an agreement to let land and not a conveyance of it, and the question may arise whether the form of the contract is governed by the *lex situs* or the *lex loci contractus*. The answer to the inquiry cannot be treated as certain; the better opinion, however, probably is that the formalities of a contract with regard to immovables are governed by the *lex situs*.<sup>3</sup>

*Marriage as an Assignment of Foreign Immovables.*<sup>4</sup>—The effect of marriage on the mutual rights of husband and wife with regard to any *foreign* immovable, *i.e.*, any land situate out of England, is (in so far as the determination of such rights can fall within the jurisdiction of an English Court) governed by the *lex situs* in the sense in which that term is used in this Digest.<sup>5</sup>

<sup>1</sup> Story, ss. 242—260; Westlake (4th ed.), pp. 271—274; Foote (3rd ed.), p. 371.

<sup>2</sup> 10 Q. B. D. 403.

<sup>3</sup> See App., Note 17, "Law Governing Contracts with regard to Immovables." The question cannot really be raised in England with regard to contracts within the fourth section of the Statute of Frauds, for that enactment, it has been decided, applies to procedure. *Leroux v. Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1. Hence a contract with regard to an interest in land cannot be enforced in England unless there is a proper note or memorandum thereof in writing, and this quite independently of the influence of the *lex situs*. See as to procedure, chap. xxxii., *post*.

<sup>4</sup> See Illustrations 10, 11, pp. 507, 508, *post*. As to the law governing the effect of *English* immovables or lands, see Exceptions 2 and 3, pp. 510, 512, *post*.

<sup>5</sup> See pp. 69, 79—81, especially p. 81, note 2, *ante*.

*Where there is a Marriage Contract or Settlement.*—The Courts of any country (*e.g.*, France) where land is situate will probably wish to give effect to the marriage contract or settlement, but it is for the Courts, or law, of the *situs* to decide what is the proper law of the marriage contract, and whether provisions allowed by that law are or are not prohibited by the local or territorial law (*e.g.*, of France) in respect of French land.

English Courts, if called upon to determine directly or indirectly the effect of a marriage contract on rights to French land, will attempt to decide the matter as a French Court would decide it, *i.e.*, will follow the *lex situs*.

*Where there is no Marriage Contract or Settlement.*—Here, again, English Courts, if called upon to determine the effect of a marriage on the mutual rights of husband and wife (*e.g.*, to French land) will attempt to decide the matter as a French Court would decide it, and will follow the *lex situs*.

*Devolution.*<sup>1</sup>—Every question with regard to the devolution of immovables, or land, in consequence of death is (subject, of course, to the exceptions hereinafter mentioned) governed by the *lex situs*. And this is so whether the devolution takes place under an intestacy or under a will, and whether the immovables be real property or personal property.

The result, as regards the devolution of a deceased person's English immovables or land (which may be either real or personal property<sup>2</sup>), is as follows :—

The deceased's immovables (whether real property or personal property<sup>3</sup>) pass on his death to his personal representative<sup>4</sup> for administration.

The beneficial succession to such immovables depends on the nature of the property. \*

On the estate being cleared, the deceased's real property descends, if he dies intestate, to his heir, or if he dies having made a valid will, to the devisee; the deceased's chattels real, *e.g.*, leaseholds, being personal property, must be distributed without any reference to the deceased's *lex domicilii*, if the deceased dies intestate, in

<sup>1</sup> See Illustrations 12—17, pp. 508, 509, *post*. *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), L. R. 9 Eq. 541; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123; *Coppin v. Coppin* (1725), 2 P. Wms. 290; *Balfour v. Scott* (1793), 6 Bro. P. C. 550 *Drummond v. Drummond* (1799), 6 Bro. P. C. 601. —

<sup>2</sup> See pp. 75—77, 303, *ante*.

<sup>3</sup> See the Land Transfer Act, 1897, s. 2.

<sup>4</sup> See p. 303, *ante*.

accordance with the Statute of Distributions (*lex situs*), or, if the deceased dies having made a valid will, then in accordance with the terms of his will. In other words, the beneficial succession to the deceased's immovable property is governed by the *lex situs* applicable to the particular kind of immovables.<sup>1</sup>

The formalities required for the devise of immovables, whether realty or personalty, the restrictions (if any) on such devise or bequest, and generally the validity of a will of lands, are wholly governed by the ordinary testamentary law of England (*lex situs*).

The devolution of immovables situate in a foreign country, *i.e.*, foreign land, or of money representing such immovables, is determined, in so far as the matter can be dealt with by English Courts, in accordance with the *lex situs* or law of such foreign country in the sense in which the term is used in this digest.<sup>2</sup>

*Guardianship, Curatorship, &c.*<sup>3</sup>—The appointment of a guardian or an assignee in bankruptcy under the law of a foreign country does not operate as an assignment to such guardian, &c. of any immovable in England.<sup>4</sup>

*Prescription.*<sup>5</sup>—The question whether the possessor or occupier of an immovable or land has or has not acquired a title thereto by lapse of time, *i.e.*, by prescription,<sup>6</sup> is to be determined in accordance with the *lex situs*, and this is so whether the land is situate in England or in a foreign country, *e.g.*, France.<sup>7</sup>

*Difficulties in application of Rule.*—The principle that rights over land are governed by the *lex situs* is thoroughly well established. The application, however, of the principle may sometimes give rise to difficulty. It may be hard to determine how far a particular provision of the *lex situs* is in strictness a provision having reference to rights over land.<sup>8</sup> It may also not be easy to

<sup>1</sup> *Duncan v. Lawson* (1889), 41 Ch. D. 394.

<sup>2</sup> See pp. 79—81, *ante*.

<sup>3</sup> See Illustrations 18, 19, pp. 509, 510, *post*.

<sup>4</sup> See Westlake, s. 166, p. 207.

<sup>5</sup> See Illustration 20, p. 510, *post*.

<sup>6</sup> *Beckford v. Wade* (1805), 17 Ves. 87; *Hicks v. Powell* (1869), L. R. 4 Ch. 741; *Re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt v. Dacre* (1876), 3 Ch. D. 295. Compare Westlake (4th ed.), p. 210; Foote (3rd ed.), pp. 205—208; and Nelson, p. 147.

<sup>7</sup> See, however, as to the limitation to an action, and with regard to an immovable, Exception 6, p. 515, *post*.

<sup>8</sup> See, *e.g.*, as to the Mortmain Act, 1888, s. 4, *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89; *Attorney-General v. Mill* (1831), 5 Bli. 593; 2 Dow & Cl. 393; *Attorney-General v. Stewart* (1817), 2 Mer. 143.

The applicability to a will of English land of the rule that marriage is a revocation

determine whether, and to what extent, the rights affected by a given transaction are rights over land.<sup>1</sup>

### Illustrations.

1. A French subject domiciled in France is 20 years of age, and owns freehold land in England. He is under English law a minor. He conveys the land to a purchaser. The effect of his minority on the validity of the conveyance is governed wholly by the law of England.<sup>2</sup>

2. A man of 22 is the citizen of a foreign country where he is domiciled, and under the law of which he is a minor. He owns freehold land in England. He is under English law an adult. His capacity to convey land is unaffected by the fact that he is a minor by the law of his foreign domicil.<sup>3</sup>

3. A foreign corporation is formed under the law of New York for the purchase of land, and with a right under the law of New York to hold land. The capacity of the corporation to hold land in England is governed by the law of England.<sup>4</sup>

4. X, a domiciled Scotchman born out of lawful wedlock, is legitimated, according to Scotch law, by the marriage of his parents after his birth. His father is possessed of freeholds in England and dies intestate. X's capacity to inherit real estate in England is governed by the law of England, and he cannot acquire the freeholds by inheritance.<sup>5</sup>

5. A domiciled Frenchman is tenant for life of freeholds in England. His right to deal with the freeholds is governed wholly by the law of England.<sup>6</sup>

6. M agrees to purchase land in Demerara of N, borrows money of A in England for the purchase, and agrees in England

thereof (Wills Act, 1837, s. 18) may well appear to depend upon the *lex situs*, but the matter is (*semble*) governed by the law to which husband and wife become subject at the time of the marriage, *i.e.*, generally speaking, the law of the matrimonial domicil. See *In re Martin*, *Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 240, judgment of Vaughan Williams, L. J.

<sup>1</sup> See *In re Piercy*, [1895] 1 Ch. 83.

<sup>2</sup> See Story, s. 431.

<sup>3</sup> *Ibid.* Compare *In re Hernando* (1884), 27 Ch. D. 284.

<sup>4</sup> See as to corporations, Williams, *Real Property* (20th ed.), pp. 295—298.

<sup>5</sup> See Rule 137, p. 479, *ante*; *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895; *Fenton v. Livingstone* (1859), 3 Macq. 497. Note that *Birtwhistle v. Vardill* has no reference to taking land otherwise than by descent. *In re Grey's Trusts*, [1892] 3 Ch. 88.

<sup>6</sup> See p. 502, *ante*.

to secure the money by a mortgage of the land. The land is not properly conveyed to *A* according to the formalities required by the law of Demerara. *M* becomes bankrupt. *X*, *M*'s assignee, completes the purchase of the land from *N*, sells it, and receives the purchase-money. Whether *A* has an equitable right to the purchase-money depends on the law of Demerara (*lex situs*), not of England.<sup>1</sup>

7. A domiciled Frenchman disposes of freehold land in England. The proper form of conveyance is determined by the law of England.<sup>2</sup>

8. A domiciled Englishman conveys to a purchaser domiciled in England a right of shooting over lands in Scotland. The conveyance is made by an instrument in writing, but not under seal. The law of England does, but the law of Scotland does not, require such a conveyance to be under seal. The conveyance is valid, *i.e.*, the forms required are determined by the law of Scotland.<sup>3</sup>

9. A domiciled Scotchman conveys to a purchaser, who is also a domiciled Scotchman, the right of shooting over land in England. The conveyance is made by an instrument not under seal. The conveyance is invalid, not being in accordance with the law of England (*lex situs*).<sup>4</sup>

10. *H*, an Englishman, domiciled in England, marries *W*, a Frenchwoman domiciled in France. There is no marriage settlement. *H*, after his marriage, purchases French land. On his death, the rights (if any) of *W* in respect of *H*'s land in France are, according to the law of France (*lex situs*), governed by the ordinary law of England,<sup>5</sup> except that the right to dower, as being contrary to French public policy, is not recognised by French law in respect of French lands.<sup>6</sup> On the death of *H*, *W* has no right<sup>7</sup> to "community" in the French land, nor to dower.

11. *H*, a Frenchman domiciled in France, marries *W*, a Frenchwoman, domiciled in France. The parties marry under the system of community, and there is no marriage settlement or con-

<sup>1</sup> *Waterhouse v. Stansfield* (1851), 9 Hare, 234; (1852), 10 Hare, 254.

<sup>2</sup> As to formalities of alienation, see p. 502, *ante*.

<sup>3</sup> *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

<sup>4</sup> Inference from *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

<sup>5</sup> *I.e.*, the law of the matrimonial domicile. See Sewell, *French Law affecting British Subjects*, pp. 112, 113; and *Samuel v. Arrouard*, (1893) 21 Clunet, 544.

<sup>6</sup> Sewell, p. 113.

<sup>7</sup> *Ibid.*; *i.e.*, *W* would not be held to have any such right by an English Court.

tract. *H*, after his marriage, purchases leaseholds in Massachusetts. According to the law of Massachusetts (*lex situs*) the rights of a married woman, wherever domiciled, in respect of land in Massachusetts, are (*semble*) governed by the local law of Massachusetts. On *H*'s death intestate the leaseholds are sold by his personal representative for 10,000*l*. The money is lodged in a bank in England. The right of *W* in respect of the 10,000*l*. is governed by the local law of Massachusetts (*lex situs*).<sup>1</sup>

12. A domiciled Scotchman dies possessed of freeholds and leaseholds in England. He leaves no will, or, what in this case is the same thing, no will which is valid according to the law of England. The freeholds descend to his heir,<sup>2</sup> according to the law of England (*lex situs*). The leaseholds devolve upon the deceased's next of kin,<sup>3</sup> as determined by the Statute of Distributions (*lex situs*).

13.<sup>4</sup> *T*, a French citizen, dies domiciled and resident in a foreign country. He executes a will in accordance with the formalities required by the law of England, *i.e.*, by the Wills Act, 1837,<sup>5</sup> but not in accordance with the formalities required by the law of the foreign country. By his will *T* makes a devise of leaseholds and all other his real estate and chattels real in England to trustees. The devise is valid, *i.e.*, the formal validity of the will as regards immovables is governed by the *lex situs*.<sup>6</sup>

14. *T*, domiciled in a foreign country, devises English immovables to trustees upon trust for sale and investment, and directs the investments to be held upon trusts for accumulation extending beyond the periods allowed by the law of England.<sup>7</sup> The restric-

<sup>1</sup> The Courts of Massachusetts do not (*semble*) approve the view taken in *In re De Nicols*, [1900] 2 Ch. 410. See "Selection of Cases on the Conflict of Laws," by J. H. Beale, jun., iii. p. 530.

<sup>2</sup> *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895.

<sup>3</sup> *Duncan v. Lawson* (1889), 41 Ch. D. 394, with which compare *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; and see, as to legitimacy, Rule 137, p. 479, *ante*.

<sup>4</sup> As to devise, see pp. 504, 505, *ante*.

<sup>5</sup> 1 Vict. c. 26.

<sup>6</sup> Compare *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123. This case is an Irish case, and refers to land in Ireland, but undoubtedly is sound in principle, and applies to immovables in England. Note that the will, which also contained bequests of movables, was, as regards them, invalid, as not being executed in accordance with the testator's *lex domicilii*, as to which see chap. xxxi., Rule 185, p. 669, *post*.

<sup>7</sup> *I.e.*, by the Thellusson Act (39 & 40 Geo. III. c. 98).

tions on the devise of English immovables, and the proceeds thereof, are governed by the *lex situs*, and the devise is invalid.<sup>1</sup>

15.<sup>2</sup> *T*, domiciled in a foreign country, bequeaths 10,000*l.* to trustees to purchase land in England for the support of a charity. Whether the bequest is void under the Mortmain and Charitable Uses Act, 1888 ?<sup>3</sup> *Semble*, it is.<sup>4</sup> But this is not certain.<sup>5</sup>

16. *T*, domiciled in England, leaves by will lands in Italy to English trustees upon trust to sell the same, and, having invested the proceeds in English investments, to hold such investments on certain trusts which are valid by the law of England and not valid by the law of Italy. The right of the trustees to take and to sell the land is governed by the law of Italy (*lex situs*). The validity of the trusts as to the proceeds of the land is governed not by the law of Italy, but by the law of England (*lex domicilii*).<sup>6</sup>

17. *T*, a British subject, is owner of land in Egypt. He executes a will containing a devise of such land, which devise, if governed by the territorial or local law of Egypt, is invalid. It is uncertain whether, at the time of the execution of his will and of his death, the testator had an English or an Egyptian domicile. On his death his executors sell the land for 16,000*l.*, and pay the sum into an English bank. It is admitted that the validity of the devise must be governed by the *lex situs*, *i.e.*, the law which the Egyptian Courts would apply to the case. It appears under the Code Civil, Arts. 77, 78, as interpreted by experts in Egyptian law, that the law which would be held applicable to the case by Egyptian Courts is, on account of the testator's nationality, the territorial law of England. The devise is valid.<sup>7</sup>

18. The proceeds of real estate (immovables) in England be-

<sup>1</sup> *Freke v. Carbery* (1878), L. R. 16 Eq. 461, with which compare *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541.

<sup>2</sup> As to wills of movables, see Rules 184, 185, pp. 667, 669, *post*.

<sup>3</sup> 51 & 52 Vict. c. 43, s. 4.

<sup>4</sup> *Attorney-General v. Mill* (1831), 2 Dow & Cl. 393; *Curtis v. Hutton* (1808), 14 Ves. 537; Westlake (4th ed.), p. 206; Story, s. 446.

<sup>5</sup> See *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89.

The question to be determined is whether the provisions of the Mortmain Acts constitute a law affecting English land, and designed to prohibit its being left directly or indirectly by will to a charitable use, or, as far as regards bequests of personalty, constitute a law limiting the right of bequest, and intended to prohibit death-bed gifts. On the one view, which is apparently that of the House of Lords (*Attorney-General v. Mill*), *T*'s bequest is invalid; on the other view, which is that of the Privy Council (*Mayor of Canterbury v. Wyburn*), *T*'s bequest is valid.

<sup>6</sup> *In re Picot*, [1895] 1 Ch. 83.

<sup>7</sup> *In re Baines* (unreported), decided by Farwell, J., 19th March, 1903.

longing to a Chilian lunatic resident in Chili, sold under the Partition Act, 1868, represent such real estate, and are not payable to his Chilian curator, *i.e.*, the appointment of the foreign curator does not affect the title to English real estate.<sup>1</sup>

19. A person resident in Victoria is the owner of real estate (immovables) in England. He becomes insolvent under a Victorian insolvency. The English real estate is not thereby vested in the insolvent's assignee.<sup>2</sup>

20.<sup>3</sup> A agrees with X in England to convey to X land in India. X refuses to accept the conveyance, on the ground that A has not a title to the land. A claims a good title by prescription. In proceedings by A against X to compel X to accept a conveyance, the question whether A has a good title must be determined in accordance with the law of India (*lex situs*).<sup>4</sup>

*Exception 1.*<sup>5</sup>—The effect of a contract with regard to an immovable is governed by the proper law<sup>6</sup> of the contract (?).

The proper law of such contract is, in general but not necessarily, the law of the country where the immovable is situate (*lex situs*).

*Exception 2.*—Where there is a marriage contract, or settlement, the terms of the contract or settlement govern the mutual rights of husband and wife in respect of all English immovables (land) within its terms, which are then possessed or are afterwards acquired.

The marriage contract, or settlement, will be construed with reference to the proper law of the

<sup>1</sup> *Grimwood v. Bartels* (1877), 46 L. J. Ch. 788.

<sup>2</sup> *Waite v. Bingley* (1882), 21 Ch. D. 674.

<sup>3</sup> As to prescription, see p. 505, *ante*. Compare, however, Exception 6, p. 515, *post*.

<sup>4</sup> Suggested by *Hicks v. Powell* (1869), L. R. 4 Ch. 741. Compare *In re Peat's Trusts* (1869), L. R. 7 Eq. 302.

<sup>5</sup> See as to this Exception chap. xxvi., Rule 154, p. 572. *post*, and comment thereon; and App., Note 17, "Law governing Contracts with regard to Immovables." \*

<sup>6</sup> For meaning of "proper law of the contract," see chap. xxv., Rule 146, p. 529, *post*.



contract, *i.e.*, in the absence of reason to the contrary, by the law of the husband's actual [or intended (?)] domicile at the time of the marriage.

The husband's actual [or intended (?)] domicile at the time of the marriage is hereinafter termed the "matrimonial domicile."

### Comment and Illustration.

Whether in this Exception and in the rest of this Digest the term "matrimonial domicile" ought to be extended, so as to mean the intended domicile of the husband, when, as occasionally happens, he, though domiciled in one country, intends, to the knowledge of both parties to the marriage, to become immediately domiciled in another country (*e.g.*, France), is a question on which there is no decisive English authority. On the theory, however, which seems to be adopted by English Courts, of a tacit contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicile, the extension of that term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage seems to be reasonable; in the United States it apparently is held that the matrimonial domicile may sometimes be (as here defined) the "intended domicile" of the husband, and that "at the time of 'the marriage interest in the personal [movable (?)] property of each spouse passes to the other, if at all, according to the law of the 'matrimonial domicile,' that is, the place where they, at the time of the marriage, contemplate living together; which is 'usually the domicile of the husband.'"<sup>1</sup> •

Though, subject to this explanation of the term "matrimonial domicile," the meaning of Exception 2 is clear, its existence under English law admits of not unreasonable doubt.<sup>2</sup> Exception 2, in truth, must stand or fall together with Exception 3, the existence whereof is *prima facie* at any rate established by *In re De Nicols*.<sup>3</sup> If, in the absence of a marriage contract, the mutual rights of

<sup>1</sup> 3 Beale, Cases, pp. 529, 530; and see *Harval v. Harval* (1884), New Jersey Eq. Rep. 279.

<sup>2</sup> See comment on Exception 3, *post*, and generally, App., Note 23, "Effect of the De Nicols cases."

<sup>3</sup> [1900] 2 Ch. 410.

husband and wife over English immovables depend, as apparently do their rights to English movables, on a tacit or implied contract that their mutual property rights shall be fixed by the law of their matrimonial domicile, it almost inevitably follows that where there is a marriage contract or settlement, the law of their matrimonial domicile must be the proper law of such contract, *i.e.*, the law by reference to which they intended the contract to be construed and interpreted.

*H*, a Dutchman domiciled in Holland, marries *W*, a Dutchwoman, also domiciled in Holland. *H* is at the time of the marriage possessed of land in England, and afterwards acquires other land there. *H* and *W* enter into a marriage contract which is equally compatible either with the intention that the rights of *H* and *W* over *H*'s land in England shall be governed by Dutch law, or with the intention that they shall be governed by English law. Dutch law is the law of the matrimonial domicile and the proper law of the contract.

*Exception 3.*<sup>1</sup>—Where there is no marriage contract or settlement, the mutual rights of husband and wife over English immovables (land), whether possessed at the time of the marriage or acquired afterwards, are (probably) governed by the law of the matrimonial domicile.

#### Comment.

This Exception, in common with Exception 2, is grounded on the principle supposed to be laid down by the House of Lords in *De Nicols v. Curlier*<sup>2</sup> with regard to movable property, and certainly applied by Kekewich, J., in the case of *In re De Nicols*,<sup>3</sup> to immovable property, namely, that when persons intermarry without making a marriage contract or settlement, they must be assumed to enter into a tacit or implied contract that their mutual property rights shall be governed by the law of their matrimonial

<sup>1</sup> *In re De Nicols*, [1900] 2 Ch. 410; *De Nicols v. Curlier*, [1900] A. C. 21. •

<sup>2</sup> [1900] A. C. 21.

<sup>3</sup> [1900] 2 Ch. 410.

domicil.<sup>1</sup> The effect, in short, of Exception 3 (taken together with Exception 2) is that the rules now admittedly maintained by English Courts with regard to the law governing the mutual rights of husband and wife over movable property apply also to their mutual rights over English immovables or land.

There still, however, remains the important question whether *In re De Nicols* was rightly decided, and therefore whether Exception 3 (for which *In re De Nicols* is the one direct authority) and with it Exception 2<sup>2</sup> are well established.

The answer to the inquiry is open to doubt. *In re De Nicols* might have been decided on the narrow ground that the English freeholds and leaseholds purchased by *H* were bought with, and therefore represented, money to a half share of which *W* was, under *De Nicols v. Curlier*, admittedly entitled. Nor can it be disputed that the Exception, if valid, introduces an immense change into what was till recently supposed to be the law of England. Westlake, who approves of the principle to which *In re De Nicols* gives expression, doubts whether the case is well decided, and sums up what was certainly supposed to be, until the decision of the two *De Nicols* cases, and what may possibly still be, the law of England, in the following words :—

“The effect of marriage,” he writes, “on English land, in the “absence of express contract, is governed by the law of England, “without reference either to the domicile of the parties or to the “place of celebration of the marriage.”<sup>3</sup>

On the whole, however, it is safer to assume that *In re De*

<sup>1</sup> It may be contended, though not, it is submitted, with success, that the House of Lords, even in regard to the movable property of married persons, laid down a rule narrower than the principle here stated, and that the judgment of the House applies only to marriages governed by the law of a country, such as France, where a Code provides more than one matrimonial system of property, or, in other words, form of settlement, one of which the parties to a marriage may, at their option, adopt. See Rule 175, p. 639, *post*, and App., Note 23, “Effect of the *De Nicols* Cases.”

<sup>2</sup> See p. 510, *ante*.

<sup>3</sup> Westlake, s. 35, p. 70. See *Welch v. Tennent*, [1891] A. C. 639. What is the rule governing the effect of marriage on Irish or Scotch land must be considered an open question. The Courts of Ireland and Scotland are bound by the decision of the House of Lords in *De Nicols v. Curlier*, but they are not bound by *In re De Nicols*, and may possibly hold that the inference drawn in that case from *De Nicols v. Curlier* is erroneous. It is also certain that neither Colonial Courts nor the Privy Council itself are technically bound by either *De Nicols v. Curlier* or *In re De Nicols*.

*Nicols* is well decided, and that Exception 3, as also probably Exception 2 must, though with some hesitation, be treated as part of the law of England.<sup>1</sup>

Exception 3, however, which we assume to be well established, is subject to limitations which ought to be carefully noted.

(1) It applies to English immovables, but it does not apply to foreign immovables. The rights of the parties to a marriage over such immovables, *e.g.*, land situate in France or in Massachusetts, must (as already pointed out) be determined by an English Court with reference to the *lex situs*, that is, by reference to the law which the Courts of the country where the property is situate, in the one instance France and in the other Massachusetts, deem applicable to the case.

(2) No marriage contract, whether implied or expressed, can give to the parties to a marriage any right in respect to English land which is prohibited by English law.

(3) No marriage contract, whether implied or expressed, can be enforced in England if its enforcement is opposed to any English rule of procedure or to any English rule as to the formalities with which English land can be conveyed, such, for example, as the Statute of Frauds, ss. 4 and 7. This principle was admitted by all parties in the argument of *In re De Nicols*. But the contention that the Statute of Frauds, ss. 4 and 7, made it impossible to enforce the merely tacit, and therefore unwritten, marriage contract between *H* and *W* with regard to land in England, was rejected by the Court on the ground that the case did not fall within the scope of the statute.

### Illustrations.

1. *H* and *W*, French citizens domiciled in France, intermarry in Paris and are subject to the system of community. They afterwards acquire a domicil in England. *H* makes a fortune in trade and purchases freehold and leasehold land in England. On the death of *H*, *W*'s rights to such land are governed by the law of the matrimonial domicil, viz., France, and *W* is entitled to a half share thereof and a will under which *H* attempts to dispose of the whole of such freehold and leasehold land is, as far as such disposition of *W*'s half share goes, invalid.<sup>2</sup>

<sup>1</sup> See Appendix, Note 23, "Effect of the *De Nicols* Cases."

<sup>2</sup> See Code Civil, Art. 1401, and *In re De Nicols*, [1900] 2 Ch. 410.

2. *H* and *W* are French citizens domiciled in France. They intermarry in Paris, and intermarry in accordance with the formalities required by French law. *H* afterwards acquires land in Massachusetts. He leaves a will under which he disposes of such land in favour of *A*. *W*'s rights over such land are governed by the *lex situs*, *i.e.*, by the law of Massachusetts, which (*semble*) is, as regards rights over land, the local or territorial law of Massachusetts. *H*'s will, in so far as the question can come before an English Court, is, as regards such land, valid.

*Exception 4.*<sup>1</sup>—Under Exceptions 1 and 2 to Rule 185 [*i.e.*, under the Wills Act, 1861, ss. 1 and 2], a will made by a *British subject* may, as regards such immovables in the United Kingdom as form part of his personal estate<sup>2</sup> (chattels real), be valid as to form, though not made in accordance with the formalities required by the *lex situs*.

*Exception 5.*—An assignment of a bankrupt's property to the representative of his creditors under the English or the Irish or the Scotch Bankruptcy Acts is an assignment of the bankrupt's immovables, wherever situate.<sup>3</sup>

*Exception 6.*<sup>4</sup>—The limitation to an action or other proceeding with regard to an immovable is (probably) governed by the *lex fori* (?).<sup>5</sup> •

<sup>1</sup> *In re Grassi*, [1905] 1 Ch. 584; *In re Watson, Carlton v. Carlton* (1887), W. N. 142; 35 W. R. 711. See comment on Exceptions 1 and 2, pp. 673—678, *post*, and App., Note 18, "The Wills Act, 1861."

<sup>2</sup> As to the relation between "personal estate," *i.e.*, "personal property," and immovables, see pp. 75, 76, and p. 304, *ante*.

<sup>3</sup> See Rule 68, p. 329, *ante*, and Rule 109, p. 429, *ante*. For an explanation of this statement see Rules cited, and contrast Rule 110, p. 430, *ante*.

<sup>4</sup> See *Beckford v. Wade* (1805), 17 Ves. 87; *Hicks v. Powell* (1869), L. R. 4 Ch. 741; *In re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt v. Daere* (1876), 3 Ch. D. 295. Compare, however, Westlake (4th ed.), p. 210, and Foote (3rd ed.), pp. 205—208.

<sup>5</sup> As to principle that all matters of procedure are governed by the *lex fori*, see chap. xxxii., p. 708, *post*.

## Comment.

Whether the possessor or occupier of land who has no title thereto has acquired by lapse of time a defence against an action or other proceeding for the recovery thereof, under a law (Statute of Limitations) which bars the *remedy* of the person otherwise entitled to recover the land, is a question of procedure which, on general principles, ought to be determined, and probably is determined, by English Courts in accordance with the *lex fori*.<sup>1</sup>

It is, however, arguable that the limitation to an action in regard to land is determined by English Courts in accordance with the *lex situs*.<sup>2</sup> But the authorities in support of this deviation from the well-established principle that procedure is governed by the *lex fori* are, to say the least, not conclusive.<sup>3</sup> And it is prob-

<sup>1</sup> For meaning of *lex fori*, see pp. 69, 78, *ante*.

<sup>2</sup> *Beckford v. Wade* (1805), 17 Ves. 87; *Hicks v. Powell* (1869), L. R. 4 Ch. 741; *In re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt v. Daere* (1876), 3 Ch. D. 295.

<sup>3</sup> No certain inference can be drawn from cases having reference to land in England, for when an action is brought in an English Court with reference to English land, the *lex fori* and the *lex situs* coincide, and the case is decided, by whatever name the law be called, in accordance with the law of England.

The cases in which English Courts entertain proceedings with regard to foreign land are necessarily rare and exceptional. (See Rule 39, p. 201, *ante*, and exception thereto, p. 203, *ante*.) And the reported cases having reference to such proceedings may suggest, but do not show conclusively, that English Courts have held questions of limitation to be governed by the *lex situs*.

*Beckford v. Wade* (1805), 17 Ves. 87, is not a case decided by an English Court in reference to foreign land. It is a decision by the Privy Council as a Court of Appeal from Jamaica. It refers to *prescription*, and only shows that the acquisition of a title to land in Jamaica is determined by the law of Jamaica.

*Hicks v. Powell* (1869), L. R. 4 Ch. 741, only establishes that, where the *lex situs* deprives a person of title to foreign land, he cannot enforce in England any right depending on the possession of a title under the *lex situs*; but the language of Hatherley, C. (p. 746), suggests that, in proceedings with regard to land, questions of procedure may perhaps be governed by the *lex situs*.

*In re Peat's Trusts* (1869), L. R. 7 Eq. 302, seems to have been in substance an Indian action. The question to be decided was, what were the shares claimable by different parties interested in a fund in England which represented the proceeds of the sale of land in India. But the decision seems to have rested on the assumption that the right to a share in the fund was the same as the right to a share in the Indian land, and that a person whose right to recover a share in the land was barred by an Indian Statute of Limitations could not in the English proceedings claim the share in the fund which represented such land. It was not, moreover, absolutely necessary to decide what was the effect, in the English proceedings, of the Indian Statute of Limitations.

*Pitt v. Daere* (1876), 3 Ch. D. 295, decides that, in an action to recover from a person in England the arrears of an annuity chargeable on and payable out of the

able that, while the *acquisition of title to land by prescription* is governed by the *lex situs*, the effect of a Statute of Limitations which only bars the *remedy* for the recovery of land, and does not give a prescriptive title to land, is governed by the *lex fori*.<sup>1</sup>

#### Illustration.

X mortgages land in one of the British colonies to A. X is in England. A brings an action to obtain a foreclosure decree against X.<sup>2</sup> The time within which such an action can be brought in England is (*semble*) governed by the *lex fori*.<sup>3</sup>

rents of land in Jamaica, the time within which an action may be maintained for the recovery of the annuity is determined, not by the English Statute of Limitations, *i.e.*, the Real Property and Limitation Act, 1833 (3 & 4 Will. IV. c. 27) (*lex fori*), but by the law of Jamaica (*lex situs*). This is the strongest authority in support of the view that the limitation to an action with regard to land is governed by the *lex situs*; but the case is not, even if rightly decided, quite conclusive. The law of Jamaica, as to the point in question, was the old law of England prior to 3 & 4 Will. IV. c. 27; and it is possible to explain the case simply on the ground that 3 & 4 Will. IV. c. 27, applies only to land in England, and that, as regards foreign land, the *lex fori* is the old law of England, which in this case coincided with the *lex situs*.

<sup>1</sup> See, especially, Story, s. 582; and Foote, pp. 205—208.

<sup>2</sup> See *Paget v. Ede* (1874), L. R. 18 Eq. 118; and compare *Exception* (p. 203, *ante*) to Rule 39.

<sup>3</sup> When, in accordance with Rule 68 (p. 329, *ante*) and Rule 100 (p. 429, *ante*), an assignment under the bankruptcy law of one country (*e.g.*, England) operates as an assignment to the representative of the bankrupt's creditors of lands situate in another country (*e.g.*, Victoria), the lands, or rather the proceeds thereof, are distributable in accordance with the rules of the English bankruptcy law, and not in accordance with the *lex situs*. This may perhaps be looked upon as a further exception to Rule 141 (p. 500, *ante*). The case, however, seems hardly to come naturally under this head; the subject of distribution is not the lands, but the proceeds of the lands.

## CHAPTER XXIV.

MOVABLES.<sup>1</sup>*Capacity.*

RULE 142.<sup>2</sup>—A person's capacity to assign a movable, or any interest therein, is governed by the law of his domicile (*lex domicilii*) at the time of the assignment (?).

This Rule must be read subject to the effect of Rules 143 and 144.<sup>3</sup>

## Comment.

In principle, capacity for the assignment of a movable, *e.g.*, by gift or sale, should be governed by the *lex domicilii* of the assignor.<sup>4</sup> Thus if X, a minor domiciled in Scotland, makes a gift of goods in England, his capacity to make, and therefore the validity of, the gift depends (it would seem) upon the law of Scotland. But on this matter it is impossible to speak with certainty. Capacity to alienate movables probably stands in the same position

<sup>1</sup> Westlake (4th ed.), chap. vii., and especially pp. 192—199; Foote, pp. 251—264; Phillimore, ss. 581—592; Story, ss. 374—402; Wharton, ss. 297—377; Savigny (Guthrie's transl., 2nd ed.), ss. 366—368, pp. 174—187; Bar (Gillespie's transl., 2nd ed.), ss. 222—228, pp. 488—502.

The Rules in this chapter refer to individual assignment of movables, *e.g.*, by sale or gift. See for General Assignment of Movables in consequence of—

(1) Marriage. (See pp. 635—644, *post.*)

(2) Bankruptcy. (See pp. 329—343, 429—435, *ante.*)

(3) Death. (See pp. 343—353, 443—454, *ante*; and compare chaps. xxx., xxxi., *post.*)

<sup>2</sup> See Savigny (Guthrie's transl.), s. 367, p. 182. Contrast Wharton, ss. 329—333. Compare *North-Western Bank v. Poynter*, [1895] A. C. 56, especially language of Lord Watson, p. 75.

<sup>3</sup> See pp. 519, 522, *post.*

<sup>4</sup> See, *e.g.*, Savigny, s. 367, p. 182. Though Savigny is, of course, not an authority in England even in the sense in which Story may, within certain limits, be taken as an authority for the guidance of English judges, yet the doctrines supported by the English Courts of recent years, in reference to the choice of law, have tended, especially as regards the law governing the assignment of movables, to coincide with the principles laid down by Savigny. His views, therefore, are well worth referring to on questions as to which no definite decision has been given by English Courts.



as capacity to contract, and there is<sup>1</sup> considerable doubt as to the limits within which contractual capacity is governed by the *lex domicilii*. We may, at any rate (it is submitted), assume that, where in fact a good title to a movable is acquired under the *lex situs*, it will be treated as valid in England, even though the person (*e.g.*, a minor) conferring a title under the *lex situs* was incapable of giving a good title under his *lex domicilii*, or, in other words, that Rule 142 is, in case of conflict, liable to be overridden by either Rule 143 or Rule 144.

*Assignment of Movable in Accordance with Lex Situs.*

RULE 143.<sup>2</sup>—An assignment of a movable which can be touched<sup>3</sup> (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*), is valid.<sup>4</sup>

<sup>1</sup> See chap. xxv., Rule 149, p. 534, and Exception 1, p. 538, *post*.

<sup>2</sup> This Rule is approved (*Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. (C. A.) 677, 683, judgment of Vaughan Williams, L. J.), and extended to a cheque of which a transfer is made in a foreign country, which transfer is valid by the law of that country, though it would not have been valid if made in England, under English law. *Cammell v. Sewell* (1860), 5 H. & N. 728; (1858)<sup>\*</sup>, 3 H. & N. 617; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, opinion of Blackburn, J., delivered to H. L.; *Freeman v. E. India Co.* (1822), 5 B. & Ald. 617; *Liverpool Marine Co. v. Hunter* (1867), L. R. 4 Eq. 62; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545, judgment of North, J. Though this case is decided by the C. A., [1892] 1 Ch. 219, on a ground different from that taken by North, J., no dissent is expressed from his view as to the authority of the *lex situs*. *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238. Contrast *Lacave v. Crédit Lyonnais*, [1897] 1 Q. B. 148, following *Kleinwort, Sons & Co. v. Comptoir National D'Escompte de Paris*, [1894] 2 Q. B. 157. In the case of *Embiricos v. Anglo-Austrian Bank*, the defendants acquired a title to the cheque, which was good according to the law of the country where such title was obtained, and ought to be recognised as valid by the Courts of other countries; hence, too, the defendants, in dealing with the cheque, were not guilty of conversion. In the case, on the other hand, of *Lacave v. Crédit Lyonnais*, the defendants had not, according to the law of any country, acquired a valid title to the cheque, and therefore, by dealing with the cheque, became guilty of conversion.

<sup>3</sup> Movable (as already pointed out, pp. 68, 74—76, *ante*) are either things which can be moved and touched, *i.e.*, goods, or things which cannot be touched, *i.e.*, choses in action or debts. As to the assignment of the latter, see Rule 144, p. 522, *post*.

<sup>4</sup> *I.e.*, of course, in England.

## Comment.

“As to personal chattels,<sup>1</sup> it is settled that the validity of a transfer depends, not upon the law of the domicil<sup>2</sup> of the owner, but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant’s rent, and the purchaser acquires a perfect title, whatever may be the law of the owner’s domicil. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law.

“... The cases on the subject are clear and consistent. In *Cammell v. Sewell*,<sup>3</sup> the master of a Prussian vessel sold the goods of an Englishman, which were on board his ship in Norway, under circumstances which gave the purchaser no title according to English law, but a good title according to the law of Norway; and it was held in the Exchequer Chamber that the law of Norway must govern the transaction, and that the property had passed to the purchaser. The authority of that decision was recognised in *Hooper v. Gumm*,<sup>4</sup> and by the House of Lords in *Castrique v. Imrie*<sup>5</sup> and *Williams v. Colonial Bank*.<sup>6</sup>”

“In my view,” says North, J., in another case, “... it is not necessary for me to express any opinion on this interesting and difficult question [viz., as to the effect of the *lex domicilii*]; for, assuming the principle above stated [viz., *mobilia sequuntur personam*] to include such a case as the present, there is another equally well-known rule of law, viz., that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by

<sup>1</sup> See, for whole of this quotation, *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, 267, 268, judgment of Kay, L. J.

<sup>2</sup> This language probably only refers to cases in which a title acquired under the owner’s *lex domicilii* comes into competition with a title acquired under the *lex situs* of the movable. We should go further than the authorities justify if we laid down that under no circumstances could a title acquired merely under the *lex domicilii* be good (see Rule 145, p. 525, *post*).

<sup>3</sup> 3 H. & N. 617; 5 H. & N. 728; 29 L. J. Ex. 350.

<sup>4</sup> L. R. 2 Ch. 282.

<sup>5</sup> L. R. 4 H. L. 414.

<sup>6</sup> 15 App. Cas. 267.

“showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled. To give an instance. According to Scotch law it is necessary, in order to give a charge on corporeal movables, that they should be delivered to and placed in the possession of the creditor. But if a domiciled Scotchman resident in London gave a duly registered bill of sale on the furniture of his house, that would be a complete and effectual transfer of the property, without its being delivered to the creditor, notwithstanding that such a disposition of furniture in Scotland would have been ineffectual without delivery.”<sup>1</sup>

These judicial dicta are, it is submitted, decisive in support of Rule 143. They show that the notion once prevalent, and in favour of which strong dicta may be cited,<sup>2</sup> that the transfer or assignment of an individual movable was invalid unless made in accordance with the owner's *lex domicilii*, is now rejected by our Courts, and that the transfer of goods in accordance with the *lex situs* gives a good title in England whatever be the domicile of the owner or whatever the mode of transfer.

A judgment *in rem* by a Court of competent jurisdiction which transfers the property in goods from one person to another is *à fortiori* conclusive, and gives a good title to the person in favour of whom the judgment is given,<sup>3</sup> and the effect in this respect of such a judgment may now be considered a deduction from the principle stated in Rule 143. This should be noted, because most if not all of the decisions, as contrasted with the judicial dicta, which can be cited in support of our Rule, refer to judgments or to proceedings of a judicial character.<sup>4</sup>

### Illustrations.

1. *A* is a domiciled Frenchman. His watch is stolen in London and sold to *X* in market overt. *X* acquires a good title against *A*, even if *A* shows that a sale in market overt does not give a good title according to the law of France.<sup>5</sup>

<sup>1</sup> *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545, judgment of North, J.

<sup>2</sup> *E.g.*, judgment of Loughborough, C., in *Sill v. Worswick* (1791), 1 H. Bl. 665, 690.

<sup>3</sup> See chap. xvii., Rule 105, p. 423, *ante*.

<sup>4</sup> *E.g.*, *Cammell v. Sewell* (1860), 5 H. & N. 728; *Alcock v. Smith*, [1892] 1 Ch. (C.A.) 238; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C.A.) 219.

<sup>5</sup> See, for these cases, *Cammell v. Sewell* (1860), 5 H. & N. 728, 743, 744, *per Curiam*. Compare language of Kay, J., in *Alcock v. Smith*, [1892] 1 Ch. (C.A.) 238, 267, 268, cited p. 520, *ante*.

2. *A* is domiciled in Germany, but is resident in lodgings in London. His goods are seized by the superior landlord, under a distress for rent due from the lodging-house keeper. The goods are sold to *X*. *X*, whatever the law of Germany, has a good title to the goods as against *A*.<sup>1</sup>

3. *A* is domiciled in England. His ship is wrecked on the coast of Norway. The cargo is sold, wrongfully according to English law, by *M*, the captain, to *X*, who acquires a good title according to Norwegian law. *X* brings the goods to England. *X* has a good title here to the goods against *A*.<sup>1</sup>       • •

4. A cheque on a London bank is drawn in Roumania in favour of *A*. It is stolen whilst in the post and presented by the thief at a bank in Vienna, which cashes the cheque in circumstances which, under Austrian law, give the bank a good title to the cheque and the proceeds thereof. The Vienna bank sends the cheque to *X & Co.*, English bankers, who obtain payment of the cheque at the London bank on which it is drawn. *A* sues *X & Co.* for conversion. *X & Co.* have a good title to the cheque as against *A*, *i.e.*, the Vienna bank acquire a good title under the law of Austria, where the cheque is transferred, and assign that title to *X & Co.*<sup>2</sup>

RULE 144.<sup>3</sup>—An assignment of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid.

Provided that

- (1) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor;<sup>4</sup>

<sup>1</sup> See note 5, p. 521.

<sup>2</sup> *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. (C. A.) 677.

“The transfer of the cheque in Vienna was governed by Austrian law, and gave ‘the Vienna bank a good title to the cheque,’ which title they transferred to *X & Co.* See *ibid.*, p. 679, and [1904] 2 K. B. 870, judgment of Walton, J., which was upheld by the Court of Appeal.

<sup>3</sup> See, especially, Foote (3rd ed.), pp. 261—264; Westlake (4th ed.), pp. 196—199; Story, ss. 395—400 b and 565; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

<sup>4</sup> *Lee v. Abdy* (1886), 17 Q. B. D. 309; *Colonial Bank v. Cadby* (1890), 15 App. Cas. 267.

- (2) the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori*.<sup>1</sup>

#### Comment.

There has been, and still exists, some uncertainty as to the law which, in case of conflict, governs the assignment of a debt. It has sometimes been held to be the *lex fori*.<sup>2</sup> According to another view, the law governing the assignment is the law of the domicile of (apparently) the creditor.<sup>3</sup> The doctrine which is now pretty well established in England is that which is enunciated in our Rule, viz., that an assignment of a debt is valid if made in accordance with the *lex situs*, in so far as a *situs* or locality can be by a sort of analogy attributed to a debt.

For a debt, though it has not in strictness any local situation, may be so connected in different ways with a particular country as to possess something which bears an analogy or resemblance to a *situs*. Thus, the place where a debtor resides (or perhaps where a debt is made payable) may be, and for many purposes is, held the *situs* of the debt; and so, again, where a debt arises from a bill of exchange or other negotiable instrument, the bill or instrument has itself a local situation which may be, and is in fact, treated for many purposes as the *situs* of the debt.<sup>4</sup> When, therefore, a *situs* or local situation can be thus artificially ascribed to a debt, the assignment thereof in accordance with the *lex situs* is, speaking generally, a valid assignment.<sup>5</sup> Hence the sale of a bill in accordance with the law of the country where the bill is situate is a valid assignment or transfer of the bill and the rights arising under it.<sup>6</sup>

*Provisos.*—We must, however, in this matter distinguish between the *validity* of the assignment or transfer of the debt and the *effect* of the assignment as against the original debtor.

<sup>1</sup> See chap. xxxii., *post*.

<sup>2</sup> *The Milford* (1858), Sw. 362.

<sup>3</sup> See, especially, Story, s. 397.

<sup>4</sup> Compare pp. 309—314, *ante*.

<sup>5</sup> The two recent cases, *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219, and *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, which most distinctly affirm the validity of an assignment of a movable in accordance with the *lex situs*, both refer to the assignment of a chose in action or debt.

Compare *Colonial Bank v. Cady* (1890), 15 App. Cas. 267, and same case, *nom. Williams v. Colonial Bank* (1888), 38 Ch. D. (C. A.) 388.

<sup>6</sup> *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

The *validity* of the assignment depends on the *lex situs*, *i.e.*, on the law of the place where the debt is to be considered as situate.

The *effect*, on the other hand, of the assignment as against the debtor, *i.e.*, what are the rights acquired by the assignee, must (it is submitted) depend on the law which governs the contract between the debtor and the creditor (assignor). Under whatever law the assignment takes place, the liability of the debtor, *X*, cannot be increased through the assignment by the creditor to another person of the claim against the debtor.<sup>1</sup>

The rights, further, of set-off and the like, which under English law are treated as matters of procedure,<sup>2</sup> are governed wholly by the *lex fori*.

### Illustrations.

1. An English bill payable in England is drawn and accepted in England by an English firm domiciled in England. It is indorsed in Norway for value to *B*. In consequence of judicial proceedings in Norway against *L* (*B*'s partner), the bill is seized in accordance with Norwegian law, and, on judgment being given against *L*, is, when overdue, sold in accordance with Norwegian law to *A*. Under the law of Norway, *A*, though the bill is overdue, takes a perfect title to the bill and the proceeds thereof freed from all equities or claims of *B*. Under the law of England, a purchaser of the bill in England would, the bill being overdue, have taken it subject to the claims of *B*. The validity of the assignment is governed by the law of Norway, and *A*'s claim to the bill and the proceeds thereof is valid as against *B*.<sup>3</sup>

2. *X & Co.*, an English banking company, assign to *B* debts owing to *X & Co.* from debtors resident in Scotland. No notice of the assignment is given to the Scotch debtors. *A* brings an action in Scotland against *X & Co.* and arrests (attaches) the debts due from the Scotch debtors to *X & Co.* Under Scotch law, the arrestment is equivalent to an assignment to *A* with intimation or notice to the debtors. Under the law of England, the assignment to *B* would, under the like circumstances, take priority over the assignment to *A*. *A* obtains judgment in Scotland against *X* for more than the amount of the debts arrested. He

<sup>1</sup> See Foote, 261—264.

<sup>2</sup> See chap. xxxii., Rule 193, p. 708, *post*.

<sup>3</sup> *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238. See, especially, pp. 253—255, judgment of Romer, J.; pp. 263, 264, judgment of Lindley, L. J.; pp. 267, 268, judgment of Kay, L. J.

has obtained a good title under the assignment in accordance with the *lex situs* (Scotland). The assignment is valid, and the claim of *A* has priority to the claim of *B*.<sup>1</sup>

3. *X*, an Englishman, incurs in England a debt to *A*, also an Englishman. The debt is assigned in France by *A* to *B*. The validity and extent of *B*'s claim against *X* is governed by the law of England, *i.e.*, it depends upon the obligations incurred under English law by *X* to *A*.<sup>2</sup>

4. The circumstances of the case are the same as in Illustration 3. *B* brings an action against *X* for the debt. *X*, at the time of contracting the debt, has a set-off against *A*. *X* can plead the set-off in the action by *B*.

5. In 1891, *H*, domiciled in New York, assigns in New York to *W*, his wife, a reversionary interest in an English trust fund. Under the law of New York notice is not required in order to complete the assignment. In 1894, *H*, being in England, assigns the said interest to *A* by way of mortgage. Notice of the later assignment is given to the English trustees. In an administration action in England the later assignment in favour of *A* is good against the earlier assignment in favour of *W*, *i.e.*, the effect of notice is determined by the law of England (*lex fori*) and not by the law of New York.<sup>3</sup>

RULE 145.<sup>4</sup>—Subject to the exception hereinafter mentioned, and to Rules 143 and 144,<sup>5</sup> the assignment of a movable, wherever situate, in accordance with the law of the owner's domicile, is valid.

<sup>1</sup> Compare *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219. This case is decided by North, J., on the ground given in the illustration. It is decided by the Court of Appeal (affirming the judgment of North, J.) on a different ground, but the Court does not seem to question the soundness of the view taken by North, J. Note that *In re Queensland, &c. Co.* is an instance of a distinct conflict between the *lex situs* and the *lex domicilii*, and that the *lex situs* prevailed.

<sup>2</sup> Compare *Lee v. Abdy* (1886), 17 Q. B. D. 309.

<sup>3</sup> *Kelly v. Selwyn*, [1905] 2 Ch. 117. The *ratio decidendi* was "the law of the Court which is administering the fund," which is equivalent to "the law of the forum for the recovery of the debt." See Westlake, p. 404, Add. *Semble*, that in this case the *lex fori* and the *lex situs*, in so far as a trust fund has a *situs*, coincide.

<sup>4</sup> See Story, s. 384.

<sup>5</sup> See p. 519 and p. 522, *ante*.

## Comment and Illustrations.

“ The general rule is, that a transfer of personal property, good by the law of the owner’s domicil, is valid wherever else the property may be situate.”<sup>1</sup> “ The transfer of personal property must be regulated by the law of the owner’s domicil, and, if valid by that law, ought to be so regarded by the Courts of every other country where it is brought into question.”<sup>2</sup>

“ It seems clear that a transfer of movables, here good by our law, would here be held good, notwithstanding that it might not comply with formalities required by the law of the domicil of the owner, but there has not been quoted to me, nor have I found, any clear case of a transfer, good according to the law of the domicil of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate.”<sup>3</sup>

The cases which illustrate these authoritative dicta have mainly, if not exclusively, reference to general assignments of movables. No reported case can (it is believed) be cited as absolutely supporting this Rule<sup>4</sup> in reference to individual assignments, *e.g.*, by gift or sale; but the validity of such assignments, when made in accordance with the owner’s *lex domicilii*, is so uniformly taken for granted by judges and by writers of eminence, such as Story, that we may assume that a sale or gift by a person domiciled in England will, at any rate if made in England, be held (if it be in accordance with English law) to be valid as regards goods, wherever situate.

And it may possibly be the case that such sale or gift of goods situate in England, by a person domiciled in a foreign country, which is made in accordance with, and is valid by, the law of his domicil, will be held valid in England. *N* is a trader domiciled in Maryland, and carrying on business both in Maryland and in England. He is owner of movable property in England. *N*, under a deed of arrangement executed in Maryland, assigns all his property to *A*, as trustee, for the benefit of his creditors. The deed is valid according to the law of Maryland (*N*’s *lex domicilii*), but is not registered in accordance with the Deeds of Arrangement

<sup>1</sup> Story, s. 384. Compare *North Western Bank v. Poynter*, [1895] A. C. 56.

<sup>2</sup> *Liverpool Marine Co. v. Hunter* (1868), L. R. 3 Ch. 479, 483, judgment of Chelmsford, C.

<sup>3</sup> *Dulaney v. Merry & Son*, [1901] 1 Q. B. 536, 541, 542, judgment of Channell, J.

<sup>4</sup> The cases which may be cited refer to general assignments, *e.g.*, in case of death.



Act, 1887 (50 & 51 Vict. c. 57), ss. 4, 5, and therefore, if governed by the law of England (*lex situs*), is void. After the deed has been executed, *X*, a creditor who has obtained judgment in England against *N*, causes *N*'s movable property in England to be taken in execution. The title of *A* to the property has been held valid as against the title of *X*.<sup>1</sup> But the property in this case passed under a general assignment. How far, therefore, the principle of Rule 145 applies to cases of individual assignments still admits of doubt.

*X*, domiciled and being in England, makes a gift by deed to *A* of goods at Paris. The gift is valid here without reference to French law.<sup>2</sup> If *X* were to bring the goods to England, no third person<sup>3</sup> having acquired a title to them under French law, the goods would be held to be the property of *A*.

The same result ought (it would seem) to follow if *X*, when domiciled in England, but being in France, makes a gift by deed to *A* of goods at Paris. In such a case, however, our Courts would possibly hold that the form required by the *lex loci* was imperative, and that therefore, if the gift does not, by the law of France, pass the property in the goods, there has been no transfer of property at all.

*X*, again, domiciled and being in a foreign country, where property in goods can be conveyed by a verbal gift, gives *A*, by word of mouth, furniture of *X*'s in London. The property (perhaps) passes to *A*.

It must, however, remain doubtful whether, at any rate, the two last examples do not fall within the exception to our Rule.

*Exception.*—When the law of the country where a movable is situate (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicile (*lex domicilii*) is, if the special form is not followed, invalid.<sup>4</sup>

<sup>1</sup> *Dulaney v. Merry & Son*, [1901] 1 Q. B. 536.

<sup>2</sup> As to French law, see Code Civil, Art. 931.

<sup>3</sup> This limitation must probably be added in accordance with Rule 143, p. 519, ante. See *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Cammell v. Sewell* (1860), 5 H. & N. 728; *Stringer v. English, &c. Ins. Co.* (1870), L. R. 5 Q. B. 599.

<sup>4</sup> *Story*, s. 383. See *Robinson v. Bland* (1760), 2 Burr. 1077, 1079; 1 W. Bl. 234, 246. The exact limits of this exception are, like the limits of the Rule itself, hard to fix. Compare *Dulaney v. Merry & Son*, [1901] 1 Q. B. 536, 542, judgment of Channell, J.

**Comment.**

The law of the owner's domicile does not determine the validity of a transfer of movables, if "there is some positive or customary law of the country where they are situate providing for special cases (as is sometimes done), or, from the nature of the particular property, it has a necessarily implied locality."<sup>1</sup> Among the latter class have been placed contracts respecting public funds or stock, the local nature of which requires them to be carried into execution according to the local law. No positive transfer can be made of such property except in the manner prescribed by the local regulations.<sup>1</sup>

<sup>1</sup> Story, s. 383.

## CHAPTER XXV.

CONTRACTS.<sup>1</sup>—GENERAL RULES.(A) *PRELIMINARY.*

RULE 146.<sup>2</sup>—In this Digest the term “proper law of a contract” means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed;<sup>3</sup> or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves.

## Comment.

A contract is a promise, or set of promises, enforceable, or intended, at any rate, to be enforceable, by law. The parties to a contract must always, therefore, intend, or be presumed to intend, that it shall be subject to, or governed by, the law of some country (*e.g.*, England), or, it may be, that part of the contract shall be governed by the law of one country (*e.g.*, of England) where it is made and part of the contract by the law of another country (*e.g.*, of Scotland) where it is to be performed.<sup>4</sup> The law or laws

<sup>1</sup> Story, chap. viii., especially ss. 241—373; Westlake (4th ed.), chap. xii., pp. 271—298; chap. xiii., pp. 299—308; Foote (3rd ed.), chap. viii., pp. 341—482; Wharton, ss. 393—546; Pollock, Principles of Contracts (7th ed.), pp. 387—394; Savigny (Guthrie's transl., 2nd ed.), ss. 369—374, pp. 194—272; Bar (Gillespie's transl., 2nd ed.), ss. 247—284, pp. 536—630.

<sup>2</sup> For the substance of this definition, see *Lloyd v. Gubert* (1865), L. R. 1 Q. B. 115, 122, 123, *per Curiam*, judgment delivered by Willes, J.; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 336, judgment of Halsbury, C. Compare comment on Rule 151, p. 545, *post*. See also *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Spurrier v. La Cloche*, [1902] A. C. 446, 450; *Surman v. Fitzgerald*, [1904] 1 Ch. (C. A.) 573.

<sup>3</sup> Or, more accurately, though in more cumbersome language, “the law of the country, or the laws of the countries, by the law or the laws whereof the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed.”

<sup>4</sup> *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

by which it is intended that a contract shall be governed may be conveniently termed the "proper law of a contract."<sup>1</sup>

### Illustrations.

1. A Scotchman and an Englishwoman marry in England. It is provided by the terms of their marriage contract that the contract shall be governed by the law of Scotland. The law of Scotland is the proper law of the contract.<sup>2</sup>

2. A Scotchman domiciled in Scotland marries in England a Scotchwoman, also domiciled in Scotland. The marriage contract or settlement is, before their marriage, executed in England. It is in the Scotch form. The law of Scotland is the proper law of the contract.

3. X, an English underwriter, enters into an English policy of insurance with A, an English shipowner. It is part of the terms of the policy that a particular term in it shall be interpreted in accordance with French law. The law of England and the law of France, to the extent intended by the policy, constitute the proper law of the contract.

RULE 147.<sup>3</sup>—Where any Act of Parliament intended to have extra-territorial operation makes any contract—

(1) valid, or

(2) invalid,

the validity or invalidity, as the case may be, of such contract must be determined in accordance with such Act of Parliament, independently of the law of any foreign country whatever.<sup>4</sup>

<sup>1</sup> As to the rule for ascertaining the intention of the parties, or, in other words, for determining what is the "proper law," see Rule 152, p. 556, and Sub-Rules 1—3, pp. 560—563, *post*.

<sup>2</sup> Compare *Chamberlain v. Napier* (1880), 15 Ch. D. 614.

<sup>3</sup> See Intro., General Principle No. II. (A.), p. 34, *ante*.

<sup>4</sup> For examples of such Acts determining—

*Capacity*, see the Marriage Act, 1835 (5 & 6 Will. IV. c. 54); the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47); *Brook v. Brook* (1861), 9 H. L. C. 193; the Royal Marriage Act, 1772 (12 Geo. III. c. 11); *The Sussex Peerage Case* (1844), 11 Cl. & F. 85.

*Form*, see the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23); and conf. *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72.

*Legality*, see *Slaye Trade Acts* (5 Geo. IV. c. 113; 7 Will. IV. & 1 Vict. c. 91; 6 & 7 Vict. c. 98; 36 & 37 Vict. c. 88).

Comment.

Sometimes, though not often, an Act of Parliament lays down a positive rule as to the validity or invalidity of a contract, wherever made. Whenever an Act of Parliament thus validates or invalidates a contract, a British Court must obey the enactment, without considering the effect of any foreign law which might otherwise be applicable to the case.

Illustrations.

1. A British subject marries a Frenchwoman at Paris. The marriage is celebrated in accordance with the provisions of the Foreign Marriage Act, 1892. The marriage is invalid in France for want of compliance on the part of the woman with the formalities required by French law. The marriage is valid, *i.e.*, its validity is determined solely by reference to the provisions of the Foreign Marriage Act, 1892.<sup>1</sup>

2. A member of the British Royal Family marries a foreign woman in a foreign country, in contravention of the provisions of the Royal Marriage Act (12 Geo. III. c. 11), which apply to members of the Royal Family wherever and under whatever circumstances they marry. The marriage, whether valid or not by the law of the foreign country, is invalid, *i.e.*, its validity is determined solely by reference to the Royal Marriage Act.<sup>2</sup>

3. A British subject, when in a foreign country, lends money to be employed in slave trading, in contravention of the Slave Trade Act, 1824 (5 Geo. IV. c. 113), s. 2, and the Slave Trade Act, 1843 (6 & 7 Vict. c. 98). The contract, whether lawful by the law of the foreign country or not, is invalid.<sup>3</sup>

4. X in France gives A a cheque drawn by him on an English bank, partly in payment of money lent by A to X to enable him to play baccarat, at a club in France, and, as to the balance, to be applied by A in discharging debts incurred by X when playing at baccarat in the club. The consideration for the cheque is legal according to the law of France. Under the Gaming Act, 1835 (5 & 6 Will. IV. c. 41), s. 4, the cheque is to be deemed given for an illegal consideration. The Act extends to a cheque given for a

<sup>1</sup> See *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705. See, further, chap. xxvii., Rule 172 (v), p. 614, *post*.

<sup>2</sup> *The Sussex Peerage Case* (1844), 11 Cl. & F. 85.

<sup>3</sup> Compare *Reg. v. Zulueta* (1843), 1 C. & K. 215.

gambling debt in a foreign country even though the consideration for it would there be legal. The cheque is given for an illegal consideration and is invalid, *i.e.*, *A* cannot recover upon it in an English Court.<sup>1</sup>

RULE 148.<sup>2</sup>—A contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure.<sup>3</sup>

### Comment and Illustrations.

This Rule is easy to understand, and illustrations of its operation are easy to find.

1. *X*, at Calais, orally engages *A* to serve him as a clerk for more than a year; there is no written memorandum of the contract. The agreement, though not in writing, is valid by French law. But under the fourth section of the Statute of Frauds no action can be brought on such a contract unless there is a memorandum thereof in writing. *A* cannot enforce the contract in England against *X*.<sup>4</sup>

2. *A*, a Frenchman, wins 100*l.* from *X*, a Frenchman, on bets made in France upon the result of a race taking place in France. The Gaming Act, 1845, s. 18, enacts that no suit shall be brought in any Court of law or equity for recovering any sum of money alleged to be won upon a wager. *A* cannot enforce the wager in England against *X*, *i.e.*, he cannot recover the 100*l.*, and this is so even though the wager be lawful and the 100*l.* be recoverable in France.

3. Under the Gaming Act, 1892 (55 Vict. c. 9), no action can be brought on any promise to pay any person any sum of money paid

<sup>1</sup> *Moulis v. Owen*, [1907] 1 K. B. (C. A.) 746. See judgments of Collins, M. R., p. 750, and of Cozens-Hardy, L. J., p. 753; but compare dissenting judgment of Fletcher Moulton, L. J., p. 757, who maintains, on apparently strong grounds, that the Gaming Act, 1835, does not apply to transactions taking place in a foreign country, *i.e.*, in a country not forming part of the United Kingdom. Compare *Sazby v. Fulton* (1908), Times, 28th July, and 23 Law Quarterly Review, p. 249.

<sup>2</sup> See *Bristow v. Sequeville* (1850), 5 Ex. 275; 19 L. J. Ex. 289; *Leroux v. Brown* (1852), 12 C. B. 801. Conf. *Gibson v. Holland* (1865), L. R. 1 C. P. 1. See Intro., General Principle No. II. (B), p. 34; and see pp. 37, 38, *ante*.

<sup>3</sup> As to wide meaning of term "procedure," see chap. xxxii., Rule 193, *post*.

<sup>4</sup> Compare *Leroux v. Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1; *Gibson v. Holland* (1865), L. R. 1 C. P. 1.

by him under or in respect of any wagering contract. *X*, a Frenchman in France, employs *A* as a betting agent to make bets on *X*'s behalf in *A*'s own name at a French race, and expressly contracts to compensate *A* for any money lost and paid by him for bets so made and paid by *A* on *X*'s behalf. *A*, acting under the agreement with *X*, loses and pays bets amounting to 100*l*. *A* cannot maintain an action for the 100*l*. *i.e.*, cannot enforce the contract.

4. *X*, in France, borrows of *A*, in France, 100*l*. to enable *A* to play at baccarat in a French club. The transaction is legal under French law. Under the Gaming Act, 1892, any promise, express or implied, to pay any person any sum of money by way of commission, fee, reward, or otherwise, in respect of any wagering contract or of any services in relation thereto or in connection therewith, is null and void, and no action can be brought or maintained to recover such money. *X* gives *A* a cheque drawn upon an English bank in payment of the loan. *Seem*, no action can be brought on the cheque or for the money lent, *i.e.*, *X*'s contract to pay the 100*l*. cannot be enforced.<sup>1</sup>

It is worth while to notice here a marked distinction between cases which come within Rule 147 and cases which come within Rule 148, now under consideration. Where a contract is alleged to be within Rule 147, the person making the allegation must show that the Act of Parliament which makes a given contract valid or invalid, as the case may be, was intended by Parliament to have extra-territorial operation, *i.e.*, to operate outside England; where, on the other hand, it is alleged that a contract falls within Rule 148, the person relying on the allegation must show that the rule of law which prevents the enforcement of the contract is a rule of procedure. But if this can be shown there is no need to prove that it has extra-territorial operation. A statute, for example, makes wagering contracts void. If it is alleged that this enactment renders void a wager made in a foreign country where the wager is lawful and valid, then the person relying on the invalidity of the wager must show that the statute was intended to apply to wagers made out of England. If, on the other hand, a statute enacts that no action shall be brought for the recovery of money lost on a wager,

<sup>1</sup> See *Moulis v. Owen*, [1907] 1 K. B. (C. A.) 746, 753, judgment of Collins, M. R. If the transaction falls within the Gaming Act, 1892, the action clearly cannot be maintained, as it is opposed to an English rule of procedure; but whether the Act does apply to a loan of money for the purpose of making or of paying wagers is open to great doubt. See *Carney v. Plummer*, [1897] 1 Q. B. 634; Anson, *Law of Contract* (11th ed.), p. 211; and 20 *Law Quarterly Review*, p. 436.

then it is necessary for the person relying on the statute for a defence against the action to show what, in the particular instance, is self-evident—that the enactment lays down a rule of procedure; but there is no need to show that the enactment was intended to operate beyond the limits of England.

## (B) *VALIDITY OF CONTRACT.*

### (i) *Capacity.*

RULE 149.<sup>1</sup>—Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

(1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.<sup>2</sup>

(2) If he has not such capacity by that law, the contract is invalid.

### Comment.

The general principle of English law seems now to be that a person's capacity to contract, or in other words to bind himself by a promise, is governed by the law of the country where he is domiciled.

The authoritative dicta in favour of the *lex domicilii* are strong.<sup>3</sup>

"It is a well-recognised principle of law," says the Court of

<sup>1</sup> See *Re Da Cunha* (1828), 1 Hagg. Ecc. 237; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88; *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46; Westlake (4th ed.), chap. iii., pp. 41—46; Foote (3rd ed.), pp. 73—78; Nelson, pp. 244, 256, 257. Compare Story, ss. 64, 81, 82. It should be added that the view of these writers is expressed in very doubtful terms; and Foote and Story, at any rate, seem to incline to the doctrine that contractual capacity is governed by the law of the country where the contract is made (*lex loci contractus*).

Note that this Rule has no reference to contracts with regard to land. See Rule 141, p. 500, *ante*. See, as to "status," Rules 125—129, pp. 458, 469, *ante*.

<sup>2</sup> It may, of course, be invalid on other grounds, *e.g.*, the not being made in due form. See Rule 150, p. 540, *post*.

<sup>3</sup> But the authority of these and other dicta in favour of the *lex domicilii* is a good deal shaken, not by the judgment, but by the dicta contained in the judgment of the Court of Appeal in *Ogden v. Ogden*, [1908] P. (C. A.) 46.



Appeal in *Sottomayor v. De Barros*, "that the question of personal capacity to enter into any contract is to be decided by the law of domicil. . . . As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil."<sup>1</sup>

So, again, in a case the decision of which turned upon the capacity of an Irishwoman, aged 18, and domiciled in Ireland, to bind herself by a contract there made with her future husband whilst she was still an infant under Irish law, Lord Halsbury thus lays down the law as to capacity: "None of these cases [*i.e.*, cases "with reference to dower] relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicil. Story has, with his usual precision, laid down the rule<sup>2</sup> that, if a person is under an incapacity to do any act by the law of his domicil, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: *quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam*."

"There is an unusual concurrence in this view amongst the writers on international law. . . . It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule. . . . But [an] . . . overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails."<sup>3</sup>

These dicta lay down the broad rule of English law in reference to contractual capacity.<sup>4</sup> A person's capacity to contract marriage, or to enter into any contract connected with marriage, certainly depends upon the law of his or her domicil at the time of the celebration of the marriage or of the making of the contract.<sup>5</sup> It is further at least possible, though not certain, that, as

<sup>1</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*; and compare *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637, 639, judgment of Stirling, J., and *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, judgment of Lord Westbury.

<sup>2</sup> *Conflict of Laws*, s. 64.

<sup>3</sup> *Cooper v. Cooper* (1888), 13 App. Cas. 88, 99, 100, *per Halsbury, C.*

<sup>4</sup> Compare *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637, 639, judgment of Stirling, J.: but contrast the criticisms in *Sottomayor v. De Barros* (1879), 5 P. D. 94, 100, 101, of Sir J. Hannen, on *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1.

<sup>5</sup> *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88. See, as to capacity to contract marriage, chap. xxvii., Rules 173, 173, pp. 613, 628, *post*; and note Exception 1, p. 633, *post*.

implied in the dicta already cited, a person's capacity to bind himself by an ordinary contract also depends upon his *lex domicilii*.<sup>1</sup>

### Illustrations.

1. A Portuguese man and a Portuguese woman are first cousins; they reside in England, but are domiciled in Portugal. By the law of Portugal they are under an incapacity to marry one another. They are incapable of intermarriage in England, *i.e.*, their capacity is governed by the law of their domicile.<sup>2</sup>

2. An Englishwoman, domiciled in England, is an infant. Previously to her marriage she enters with her intended husband, a Frenchman domiciled in France, into a notarial contract made in France dealing with her property according to French law. They intermarry in France. Her capacity to make the notarial contract is governed by English law. As she is an infant, the contract is invalid.<sup>3</sup>

3. A girl of 18, domiciled in Ireland, is engaged to marry a Scotchman domiciled in Scotland; it is contemplated that they should reside, and they do in fact after their marriage reside, in Scotland. She executes in Ireland an ante-nuptial contract with her intended husband whereby her rights to property after the marriage are regulated. Her capacity to make this ante-nuptial contract is governed by Irish law (*lex domicilii*);<sup>4</sup> and as she under such law was, being an infant, incapable of binding herself by a contract not to her advantage, the ante-nuptial settlement is invalid,<sup>5</sup> *i.e.*, is voidable by her.<sup>6</sup>

4. In 1844 an Englishwoman married to a French husband, whose domicile is French, enters in England, after her marriage, and therefore when domiciled in France, into a contract with respect to her reversionary interests in trust moneys invested in the English funds. The contract is in substance valid according to French law, but, if governed by English law, is invalid on account of the woman's incapacity to contract. The contract is

<sup>1</sup> See Exception 1, p. 538, *post*.

<sup>2</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1.

<sup>3</sup> *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637.

<sup>4</sup> Note that it is also the *lex loci contractus*. Whether this affects the validity of the contract?

<sup>5</sup> *Cooper v. Cooper* (1888), 13 App. Cas. 88.

<sup>6</sup> *Duncan v. Dixon* (1890), 44 Ch. D. 211.

valid, *i.e.*, the woman's contractual capacity is governed by the law of her domicile.<sup>1</sup>

5. A Frenchwoman is married to an Englishman domiciled in England. She purchases goods from a tradesman in a foreign country. By the law of the country where the contract is made (*lex loci contractus*), she incurs the same liability for the price of the goods as an unmarried woman. She is sued for the price in England. Her capacity to contract, and therefore her liability, is (*semble*) governed by the Married Women's Property Act, 1882, as amended by the Married Women's Property Act, 1893 (*lex domicilii*).<sup>2</sup>

6. In 1864 an Englishwoman domiciled in England, when still under 21, marries an Austrian subject domiciled in Austria. Before the marriage they execute a marriage settlement (marriage contract) in the English form. Under Austrian law a husband and wife have a right to revoke their marriage settlement notwithstanding the birth of issue and notwithstanding ratification, and this right of revocation cannot be waived and is not lost by lapse of time. In 1893 the husband and wife exercise their right of revocation and annul the settlement. In 1896 they bring in England an action against the trustees of the settlement, claiming a declaration that the settlement was revoked by the action of the husband and wife in 1893. The revocation is effectual, *i.e.*, the incapacity of the wife as an infant to make a settlement under English law (*lex domicilii*), and her incapacity to make an irrevocable settlement under Austrian law (*lex domicilii* after marriage), make it impossible for the settlement to be valid.<sup>3</sup>

7. X, a man of 20, is domiciled in England. When in a foreign country, where a man attains his majority at the age of 20, he incurs a debt for the price of jewels sold to him. By the law of the foreign country he is liable for the price of the jewels. An action is brought for the debt in England. His capacity (*semble*) is governed by the law of England. Being under English law an infant, he is incapable of contracting to pay for the jewels and is not liable for the price (?).<sup>4</sup>

<sup>1</sup> *Guépratte v. Young* (1851), 4 De G. & Sm. 217.

<sup>2</sup> A question may be raised as to how far the Married Women's Property Acts in strictness touch the question of capacity at all.

<sup>3</sup> *Fiditz v. O'Hagan*, [1900] 2 Ch. (C. A.) 87; and compare *Smith v. Lucas* (1881), 18 Ch. D. 531.

<sup>4</sup> If capacity depends on the *lex domicilii*, X is clearly not liable. The Infants' Relief Act, 1874, s. 1, moreover, is, perhaps, a law affecting procedure (see

*Exception 1.*—A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) (?).<sup>1</sup>

#### Comment.

"It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made, or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here, as well as abroad, seems to be in favour of the law of the domicile. It may be that all cases are not to be governed by one and the same rule."<sup>2</sup>

These words exactly express the doubt which exists as to the law governing a person's contractual capacity. On the one hand, it appears to be established that, in accordance with Rule 149,<sup>3</sup> capacity to marry or to enter into a contract connected with marriage depends on the *lex domicilii* of the contracting party; and it is further clear that the language judicially used in *Sottomayor v. De Barros*<sup>4</sup> implies that a person's *lex domicilii* governs his capacity to enter into any contract whatever. On the other hand, there are strong grounds for holding that capacity to enter into an ordinary mercantile contract, e.g., for a loan or for the purchase or sale of goods, is governed, not by the *lex domicilii* of the contracting party, but by the law of the place where the contract is made (*lex loci contractus*). Story certainly holds to this opinion.<sup>5</sup> In one reported case, where the point is distinctly raised though not precisely

chap. xxxii., *post*, and compare Rule 148, p. 532, *ante*), and therefore a bar to an action against X for the price of the jewels; there may, however, be a distinction in this matter between sect. 1 and sect. 2 of the Infants' Relief Act, 1875.

<sup>1</sup> See *Male v. Roberts* (1799), 3 Esp. 163; *Stephens v. McFarland* (1845), 8 Ir. Eq. Rep. 444; *Re D'Orleans* (1859), 1 Sw. & Tr. 253; *Guépratte v. Young* (1851), 4 De G. & S. 217; *Sottomayor v. De Barros* (1879), 5 P. D. 94, 100, 101, language of Sir J. Hannen; *Ogden v. Ogden*, [1908] P. (C. A.) 46.

Compare especially Foote, p. 77, and Westlake, pp. 41—46.

<sup>2</sup> *Cooper v. Cooper* (1888), 13 App. Cas. 88, 108, per Lord Macnaghten.

<sup>3</sup> See p. 534, *ante*; and see further, as to capacity to marry, chap. xxvii., Rules 172, 173, pp. 613, 628, *post*.

<sup>4</sup> See pp. 534, 535, *ante*.

<sup>5</sup> See Story, s. 82.

decided, Lord Eldon held, in regard to a contract made by an English infant in Scotland, that the effect of infancy, as a defence to an action on the contract, depended upon the law of Scotland. To this may be added that to allow the validity of an ordinary contract made in England by a person domiciled abroad to depend upon the law of his domicile would often lead to inconvenience and injustice. It would certainly be strange if an Englishman of the age of 24, who happened to be domiciled in a country where the age of majority is fixed at 25, could escape liability for the price of goods bought by him from a tradesman in London by pleading that he was a minor under the law of his foreign domicile and not liable for the price of the goods.

### Illustrations.

1. X, an infant domiciled in England, is, when in a foreign country, arrested for a debt there incurred. A pays it for him. A brings an action against X in England for the money so paid. *Semble*, X's capacity to incur the debt to A is governed by the law of the foreign country.<sup>1</sup>

2. X, an infant domiciled in England, enters, when in Scotland, into a contract to serve A, a domiciled Scotchman, for six months. X's capacity to enter into the contract is (*semble*) governed by the law of Scotland.<sup>1</sup>

3. X, a man of 21, is an Englishman residing in England. He is domiciled in a foreign country where minority lasts till the age of 22. He incurs a debt to a tradesman in England which he is not capable of incurring under the law of his domicile. He is sued

<sup>1</sup> Compare *Male v. Roberts* (1799), 3 Esp. 163; 6 R. R. 823. "It appears from the evidence in this case, that the cause of action arose in Scotland; the contract must be, therefore, governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there?" 3 Esp. 164, and 6 R. R. 823, per Eldon, C.

"The law of the country where the contract arose must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence." 3 Esp. 164, 165; 6 R. R. 824.

In *Male v. Roberts* the domicile of the infant is not stated, but, *semble*, was English. Illustration 1 gives the facts in *Male v. Roberts*, but that case, if it now arose, might be affected by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1. Illustration 2 is suggested by *Male v. Roberts*, and clearly does not fall within the Infants' Relief Act.

for the debt in England. His capacity to contract, and therefore his liability for the debt, is (*semble*) determined by the law of England.<sup>1</sup>

4. X, a man of 18, domiciled in Russia, accepts [in England ?] a bill of exchange. An infant is not capable of binding himself by a bill of exchange according to the law of England. X's capacity to accept the bill (*semble*) is governed by the law of England, and he is not liable on the bill.<sup>2</sup>

*Exception 2.*—A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*.<sup>3</sup>

(ii) *Form.*

RULE 150.<sup>4</sup>—Subject to the exceptions hereinafter mentioned, the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*).

(1) Any contract is formally valid which is made in accordance with any form recognised as valid by the law of the country where the contract is made (which form is, in this Digest, called the local form).<sup>5</sup>

(2) No contract is valid which is not made in accordance with the local form.<sup>6</sup>

<sup>1</sup> See for a case of this kind brought before the French Courts, *Pellin Ferron v. Santo Venia*, *Journal du Droit International Privé*, v., p. 502; and compare Bar (Gillespie's transl., 2nd ed.), ss. 133—144, especially s. 142.

<sup>2</sup> Suggested by *In re Soltykoff*, [1891] 1 Q. B. (C. A.) 413. The case is very briefly reported, and the infant's domicile is not stated. But it seems to have been assumed that his liability in any case depended on the law of England. Compare Chalmers, *Bills of Exchange* (6th ed.), pp. 61, 62.

<sup>3</sup> See pp. 500, 501, *ante*.

<sup>4</sup> Westlake, pp. 271—274; Foote, pp. 371—381; Story, ss. 260—262 a.

<sup>5</sup> *Compton v. Bearcroft* (1769), 2 Hagg. Cons. 430; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54; *Leroux v. Brown* (1852), 12 C. B. 801, 824, judgment of Jervis, C. J.; *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

<sup>6</sup> *Bristow v. Sequeville* (1850), 19 L. J. Ex. 289; 5 Ex. 275; *Alves v. Hodgson* (1797), 7 T. R. 241; *Clegg v. Levy* (1812), 3 Camp. 166; *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151; *Benham v. Mornington* (1846), 3 C. B. 133; *Kest v. Burgess* (1840), 11 Sim. 361; *In re Estate of M' Loughlin* (1878), 1 L. R. Ir. (Ch.) 421.

Comment.

The one principle of English law with regard to the law regulating the form of a contract, or the formalities in accordance with which a contract is made, is that the form depends, both affirmatively and negatively, upon the law of the country where the contract is made (*lex loci contractus*). "The formalities required for "a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are sufficient for its external validity in "England,"<sup>1</sup> and "the formalities required for a contract by the "law of the place where it was made, the *lex loci contractus celebrati*, are also necessary for its validity in England."<sup>2</sup>

Any difficulty which may arise in the application of this principle is generally due<sup>3</sup> to one of two causes, neither of which has any special relation to the principles of private international law: first, there may be a doubt as to what is the place where a given contract is finally completed or made; thus if X, living in England, enters into a contract with A, living in Germany, by letters sent through the post, there may be a doubt whether the contract is to be considered as made in England, and subject, therefore, as to its form, to the law of England, or made in Germany, and subject, therefore, as to its form, to the law of Germany; secondly, it is in some cases hard to determine whether a given formality, *e.g.*, the necessity for a stamp, belongs to the form of a contract, in which case it is governed by the law of the place where the contract is made, or to the evidence of a contract, in which case the necessity for the stamp is a matter of procedure, and is governed, not by the law of the country where the contract is made (*lex loci contractus*), but by the law of the country where an action on the contract is brought, or, speaking more generally, where legal proceedings are taken to enforce the contract (*lex fori*).

The general rule, however, whatever the difficulties in its application, is clear. A contract made in one country (*e.g.*, France), even though performable in another (*e.g.*, England), is, as far as its form goes, valid in England if made in a manner required or permitted by French law, and is invalid in England if not made in a manner required or permitted by the law of France, and this

<sup>1</sup> Westlake (4th ed.), p. 271.

<sup>2</sup> *Ibid.*, p. 272.

<sup>3</sup> A nice question may also be raised as to the extension to be given to the idea of the "form" of a contract. Does it include, for example, consideration?

is so even though the contract be made in the form required by English law for the validity of a contract of the same kind when made in England.

### Illustrations.

1. An Englishman passes four weeks in Scotland ;<sup>1</sup> marries an Englishwoman, who has only just arrived in Scotland, by mere declaration before witnesses. The marriage is in a form allowed by the law of Scotland. The marriage is valid.<sup>2</sup>

2. An Irishman temporarily resident in Japan marries a Japanese woman in Japan according to the forms required by the law of the country. The marriage is valid.<sup>3</sup>

3. An Englishman and an Englishwoman domiciled in England are married in accordance with the ceremonies of the Church of England in Belgium. The solemnisation of the marriage does not follow the form required by the law of Belgium. The marriage is invalid.<sup>4</sup>

4. X and A enter, in a foreign country, into a contract, which is there void for want of a stamp. The contract is invalid.<sup>5</sup>

*Exception 1.*<sup>6</sup>—The formal validity of a contract with regard to an immovable depends upon the *lex situs* (?)

*Exception 2.*<sup>7</sup>—A contract made in one country in accordance with the local form<sup>8</sup> in respect of a movable

<sup>1</sup> See 19 & 20 Vict. c. 96.

<sup>2</sup> See *Compton v. Bearcroft* (1769), 2 Hagg. Cons. 430 ; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54. See chap. xxvii., Rule 172, p. 613, *post* ; *Leroux v. Brown* (1852), 12 C. B. 801, 824, judgment of Jervis, C. J. See Story, ss. 260–262. The principle, that the formal validity of a contract depends in general upon the observance of the local form, is specially well illustrated by the decisions with regard to the validity of a marriage made in a foreign country. The truth is that the strict adherence of English Courts to the rule, that the form of a contract is governed by the *lex loci contractus*, arises in a great degree from the fact that the earliest English decisions on the subject had reference to the contract of marriage. See App., Note 5, “Preference of English Courts for *lex loci contractus*.”

<sup>3</sup> *Brinkley v. Attorney-General* (1890), 15 P. D. 76. See chap. xxvii., Rule 172, p. 613, *post*.

<sup>4</sup> *Kent v. Burgess* (1840), 11 Sim. 361.

<sup>5</sup> *Bristow v. Sequeville* (1850), 5 Ex. 275 ; 19 L. J. Ex. 289. Compare *Alves v. Hodgson* (1797), 7 T. R. 241.

<sup>6</sup> See pp. 501–503, *ante* ; *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

<sup>7</sup> *Robinson v. Bland* (1760), 2 Burr. 1077.

<sup>8</sup> For meaning of “local form,” see Rule 150, p. 540, *ante*.



situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*).

**Comment.**

The law of a country (*e.g.*, of France) where a movable is situate may require for the validity of any contract with regard to such movable that it should be made in a particular form, *e.g.*, be in writing or be registered. In this case it is possible, though not certain, that such a contract, though made in another country (*e.g.*, in England), would be held by an English Court invalid if it did not conform to the formalities required by the law of France. The subject, however, is one on which there is a want of authority, and the consideration of it is complicated by the fact that a contract with regard to a movable is often not only a contract but also an assignment. It is, however, pretty certain that a contract with regard to land or immovables<sup>1</sup> is not valid if it does not comply with the forms, if any, required for its validity by the *lex situs*, and the increasing tendency of English decisions clearly is to diminish the distinction between the rules governing rights over immovables and the rules governing the rights over movables when situate in a foreign country.

*Exception 3.*—Possibly a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made (?).

**Comment.**

It has been suggested that “if a contract is intended by the “parties thereto to be an English contract and transaction, or a “contract and transaction of any other country [than the country “in which it is made], it will be a good contract and enforceable

<sup>1</sup> See chap. xxiii., p. 500, *ante*.

“in England if it complies with the formalities required, if so intended to be an English contract, by the law of England, or, if so intended to be a contract of some other country, with the formalities required by the law of such country.”<sup>1</sup>

This suggestion of Mr. Nelson's cannot be supported by adequate authority, but it is in itself reasonable, and falls in with the tendency<sup>2</sup> of English Courts to refer every question connected with a contract to the law by which the parties intended the contract to be governed. There are, moreover, one or two cases which are best explained by admitting this possible exception to Rule 150.<sup>3</sup>

### Illustrations.

A Frenchman domiciled in France marries an Englishwoman resident in France, but domiciled in England. The marriage takes place in France. Before the marriage a settlement is executed by the parties in France of movable property of the woman in England. The settlement is made according to the form and in the manner required by the law of England, but not in conformity with the formalities required by the law of France. If governed by the law of France, the settlement would be void; if governed by the law of England, the settlement would be valid. The settlement is valid.<sup>4</sup>

*Exception 4.*—In certain cases a bill of exchange may be treated as valid, though it does not comply with the requirements, as to form, of the law of the country where the contract is made.<sup>5</sup>

<sup>1</sup> See Nelson, pp. 257, 258.

<sup>2</sup> See, e.g., *Re Marseilles Extension Co.* (1885), 30 Ch. D. 598; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321.

<sup>3</sup> “With regard to form, it may be that a contract for the employment of a ship, which has been effectually made according to the law of her flag, would be considered valid although not completed with all the forms required by the law of the place of the contract.” Carver, *Carriage by Sea*, s. 213. See *Van Grutten v. Digby* (1862), 31 Beav. 561; 32 L. J. Ch. 179.

<sup>4</sup> *I.e.*, in England. *Van Grutten v. Digby* (1862), 31 Beav. 561; 32 L. J. Ch. 179.

“I hold it to be the law of this country that if a foreigner and Englishwoman make an express contract previous to marriage, and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then and in that case this Court will administer the law on the subject as if the whole matter [including the formal validity of the contract] were to be regulated by English law.” Per Romilly, M. R., 31 Beav. p. 567.

<sup>5</sup> See chap. xxvi., Rule 163, (1) (a) and (b) (pp. 588; 589, *post*), and Bills of Exchange Act, 1882, s. 72. See also Rule 147, p. 530, *ante*.

(iii) *Essential Validity.*

RULE 151.<sup>1</sup>—The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law<sup>2</sup> of the contract.

Comment.

A contract, though made by persons competent to contract,<sup>3</sup> and though formally valid,<sup>4</sup> may nevertheless, on account of something in the nature of the contract itself, be wholly or partially invalid. It may, that is to say, be a contract to which, on account of its terms or of its nature, the law refuses to give effect. It then lacks “essential” or “material” validity.<sup>5</sup>

This defect may arise from the contract being strictly unlawful, *i.e.*, from its being one which the law actually forbids; such, under the law of England, is a contract for the promotion of the slave trade, or a contract which, as being tainted with champerty or maintenance, tends to pervert the due course of justice.<sup>6</sup> The defect, again, may arise from the contract being one which, though not strictly forbidden, is made void or voidable by law; such, under the law of England, is a gratuitous promise, when not made under seal, and such is a contract in restraint of trade.

<sup>1</sup> *Robinson v. Bland* (1760), 2 Burr. 1077; *Santos v. Illidge* (1860), 8 C. B. (N. S.) 861 (Ex. Ch.); *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The Gaetano* (1882), 7 P. D. (C. A.) 137; *Chartered Bank of India v. Netherlands Co.* (1882), 9 Q. B. D. 118; (1883), 10 Q. B. D. (C. A.) 521; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321; *The August*, [1891] P. 328; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

Compare Westlake, pp. 280—283; Nelson, pp. 261—266; Foote, pp. 381—390. Rule 151 agrees, I think, in substance with the view of Westlake and Nelson, but not with that of Foote. See App., Note 19, “What is the Law determining the Essential Validity of a Contract?”

<sup>2</sup> For the meaning of “proper law of a contract,” see Rule 146, p. 529, *ante*; and see Rule 152, p. 556, *post*, and Sub-Rules thereto, pp. 560—568, *post*. For a valuable statement of the limits (often neglected) within which the proper law of a contract, or, in other words, the intention of the contracting parties, can affect its validity, see Pillet, *Principes de Droit International Privé*, ch. xv., “Le principe d'autonomie de la volonté.”

<sup>3</sup> See Rule 149, p. 534, *ante*.

<sup>4</sup> See Rule 150, p. 540, *ante*.

<sup>5</sup> The same sort of invalidity may, of course, exist in the case of instruments which are not contracts—*e.g.*, wills.

<sup>6</sup> Pollock, *Contracts* (7th ed.), p. 393.

The laws, however, of different countries differ as to the contracts which they render invalid. Thus, a contract by a solicitor to conduct an action on the terms of sharing the damages (if any) which are recovered, though void under the law of England,<sup>1</sup> may be perfectly valid under the law of a foreign country, and a gratuitous promise, though as a rule void under the law of England, is legally binding under the law of many foreign countries.

When, therefore, a contract contains any foreign element (*i.e.*, whenever there is a possible choice of law), the question may arise, What is the law which governs the material validity of the contract? The reply to this inquiry is admittedly open to some doubt, but the answer to be drawn from the reported decisions of English Courts is (it is submitted) given in Rule 151. The essential validity of a contract is, subject to very wide exceptions, indirectly at any rate, determined by the proper law of the contract,<sup>2</sup> that is, by the law or laws to which the parties when contracting intended, or may fairly be presumed to have intended, to submit themselves. The same conclusion may be put in a different shape, and be expressed in terms more nearly corresponding with the language used by English judges. When the question arises whether a given contract, or part of a given contract, made in one country (*e.g.*, England), and to be performed wholly or partially in another (*e.g.*, France), is or is not valid, our Courts are accustomed to consider whether the contract is an "English contract"<sup>3</sup> or a "French contract." If it is an "English contract," they hold that its validity is in general governed by the law of England; if it is a "French contract," they hold that its validity is in general governed by the law of France. But the answer to the question whether a given agreement is to be considered an English contract or a French contract, though in the eyes of English judges it does not depend exclusively upon any one circumstance (*e.g.*, the place where the contract is made, or the place where the contract is to be performed),<sup>4</sup> does depend upon the intention of the parties as to the law by

<sup>1</sup> *Grell v. Levy* (1864), 16 C. B. (N. S.) 73.

<sup>2</sup> For the meaning of "proper law of the contract," see Rule 146, p. 529, *ante*.

<sup>3</sup> It is usual and convenient to describe a contract as the contract of the country which supplies its proper law. Thus, an "English contract" means a contract which the parties intend to be governed by the law of England. A "French contract" means a contract which the parties intend to be governed by the law of France.

<sup>4</sup> See *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

which the contract is to be governed, or, in other words, upon the proper law of the contract.<sup>1</sup>

*Considerations limiting effect of Rule.*—This statement, that the proper law of a contract determines its material validity, must be taken subject to the following limitations:—

*First.* The intention which determines the proper law, and therefore in general<sup>2</sup> the validity, of a contract, is the intention of the parties (exhibited usually by their conduct and the nature of the agreement) actually and in fact to contract with reference to the law of a given country, *e.g.*, England.

This intention is a quite different thing from the intention, which, in the absence of fraud or the like, must always exist, that a contract shall be valid; it is a different thing also from the intention that a contract made in fact under the law of one country shall, as to its validity, be governed by the law of some other country. This is clearly a result which cannot be effected by the will of the parties.<sup>3</sup>

*Secondly.* The “proper law” of a contract is, in a great number of instances, the law of the country where the contract is to be performed (*lex loci solutionis*). The assertion, therefore, of many writers, that the essential validity of a contract is governed by the law of the place of performance, does not in its results differ greatly from our Rule.

*Thirdly.* The exceptions to Rule 151 are of a very wide character, and greatly limit the application of the principle that the essential validity or legality of a contract is determined by its proper law.

### Illustrations.

1. In 1858 *X*, a British subject domiciled in England, makes in Brazil a contract, then lawful by the law of Brazil, for the sale to *A*, a Brazilian domiciled in Brazil, of slaves who, under the law

<sup>1</sup> See App., Note 19, “What is the Law determining the Essential Validity of a Contract?”

<sup>2</sup> See Exceptions 1—3, pp. 549—553, *post*, for cases where the validity of a contract does not depend upon its proper law.

<sup>3</sup> As to the determination of the proper law of a contract, see Sub-Rules to Rule 152, pp. 560—563, *post*. See also App., Note 19, “What is the Law determining the Essential Validity of a Contract?” A contract, be it noted, may, as to some of its terms, be governed by the law of one country (*e.g.*, England), and as to others by the law of another country, *e.g.*, Scotland. *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

of Brazil, are lawfully held there by X. The contract is to be performed in Brazil. Brazilian law is the proper law of the contract. The contract is held in England lawful and valid.<sup>1</sup>

2. In 1842 A lends money to X at Baden Baden to gamble at public tables, and also wins money from him there at cards in sums below 10*l*. The contract is at that date unlawful by English law, but not by the law of Baden. The law of Baden is the proper law of the contract. The contract is valid.<sup>2</sup>

3. By a charterparty entered into at Boston, Mass., by X & Co., a company incorporated in England, with A for the shipment of cattle in an English ship to England, it is provided (*inter alia*) that "X & Co. shall not be liable for negligence of master or crew." Such provision is valid by English law (law of flag), but is invalid by the law of Massachusetts. Cattle are injured on the coast of Wales through negligence of master or crew. English law is the proper law of the contract. The provision is valid, and X & Co. are not liable for the damage.<sup>3</sup>

4. A bond is made by X, the master of a foreign ship, hypothecating cargo laden on board the ship. The bond is valid according to its proper law, *i.e.*, the law of the country to which the ship belongs, but is not valid according to English law. The bond is valid in England, *i.e.*, its validity is determined in accordance with its proper law.<sup>4</sup>

5. In 1892 X, residing in Scotland, enters in England into a contract with A, which is to be performed, as to most of its terms, in Scotland. The contract contains this clause: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." The clause is then void under the law of Scotland, but valid under the law of England. The law of

<sup>1</sup> *Santos v. Illidge* (1860), 8 C. B. (N. S.) 861; 29 L. J. C. P. 348.

<sup>2</sup> *Quarrier v. Colston* (1842), 1 Phillips, 147. The date is important, because since the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, no action could be brought in England on a contract, wherever made, to pay money lost on a wager. Whether, since the Gaming Act, 1892 (55 Vict. c. 9), an action can be brought to recover money lent to make or to pay wagers is not certain. Compare *Carney v. Plummer*, [1897] 1 Q. B. 634; *Moulis v. Owen*, [1907] 1 K. B. (C. A.) 746, 753; and Anson, *Law of Contract* (11th ed.), pp. 211, 212.

<sup>3</sup> *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, and (C. A.) 330.

<sup>4</sup> *The Gaetano* (1882), 7 P. D. (C. A.) 137. See further, chap. xxvii, Rule 157, p. 576, and Sub-Rule, p. 579, *post*.

England is, as regards the arbitration clause, the proper law of the contract, and the arbitration clause is valid.<sup>1</sup>

6. *X* and *A* are Scotchmen domiciled in Scotland. They are sailing on Loch Katrine. The boat capsizes, and *A* saves *X*'s life at the risk of his own. *X*, soon afterwards, and without any other consideration than that of gratitude, promises *A* in writing to pay him 1,000*l*. *X* has property both in England and in Scotland. He goes to England and refuses to pay the 1,000*l*. If the contract is governed by Scotch law<sup>2</sup> it is valid, and *X* is liable to pay the 1,000*l*. If it is governed by English law, the contract is void, and *X* is not liable to pay the 1,000*l*. *Semble*,<sup>3</sup> the law of Scotland is the proper law of the contract and the contract is valid, *i.e.*, *X* is in England, as in Scotland, liable to an action for the 1,000*l*.

7. *X* and *A* are Englishmen domiciled in England, but travelling for a week's tour in Scotland. *A*, in Edinburgh, saves *X*'s life at the risk of his own, and *X* soon afterwards, and whilst in Scotland, promises *A* in writing to pay him 1,000*l*. as a mark of *X*'s gratitude. They both return to England. *X* refuses to pay the 1,000*l*. The law of England (*semble*) is the proper law of the contract, and the contract is invalid, *i.e.*, *X* is not liable in England to an action for the 1,000*l*.<sup>4</sup>

8. *X* and *A*, Scotchmen domiciled in Scotland, are travelling for a week's tour in England. *A*, in London, saves *X*'s life at the risk of his own, and *X* soon afterwards, and whilst in England, promises *A* in writing to pay him 1,000*l*. as a mark of *X*'s gratitude. *X* later refuses to pay the 1,000*l*. Whether the proper law of the contract is the law of Scotland or the law of England, and whether the contract is valid or not (?)

*Exception 1.*<sup>5</sup>—A contract (whether lawful by its proper

<sup>1</sup> *Hamlyn v. Tullisier Distillery*, [1894] A. C. 202. This is a particularly strong case, as it was decided by the House of Lords, when sitting as a Scotch Court of Appeal, with regard to an action brought in Scotland. See also *Spurrier v. La Cloche*, [1902] A. C. 446.

<sup>2</sup> See Patterson, *Compendium*, ss. 441, 435.

<sup>3</sup> There is no reported case known to me deciding the points raised in Illustrations 6 to 8, but there is some slight authority for the statement that a contract which would be void for want of consideration if it were an English contract will, if made abroad and performable in a foreign country under the law of which it is valid, support an action in England. *Scott v. Pilkington* (1862), 2 B. & S. 11; 31 L. J. Q. B. 81.

<sup>4</sup> Nor, *semble*, in Scotland.

<sup>5</sup> See especially, Nelson, p. 261, and Intro., General Principle No. 2 (B), p. 34, *ante*.

law or not) is invalid<sup>1</sup> if it, or the enforcement thereof, is opposed to English interests of State, or to the policy of English law, or to the moral rules upheld by English law.

### Comment.

English Courts cannot be used to enforce contracts which violate English law, or which are opposed to English interests of State, to the general policy of English law, or, if we may use a very vague term, to the morality upheld by English law.<sup>2</sup> This principle has thus been stated with reference to a particular case:—

It has been “insisted that, even if the contract was void by the “law of England as against public policy, yet, inasmuch as the “contract was made in France, it must be good here, because the “law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this “country. It appears to me, however, plain on general principles “that this Court will not enforce a contract against the public “policy of this country, wherever it may be made. It seems to “me almost absurd to suppose that the Courts of this country “should enforce a contract which they consider to be against “public policy, simply because it happens to have been made “somewhere else.”<sup>3</sup>

### Illustrations.

1. *X*, in England, contracts with *A* for loans to assist the subjects of a foreign State to carry on a rebellion against the sovereign of such State, who is then in amity with the British Crown. The contract is opposed to English interests of State and invalid.<sup>4</sup>

2. *X*, a Frenchman, contracts with *A*, also a Frenchman, in

<sup>1</sup> *I.e.*, in England.

<sup>2</sup> See on this point, Pollock, *Contracts* (7th ed.), chap. vii.; Foote (3rd ed.), pp. 386—389.

<sup>3</sup> *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 369, judgment of Fry, J.

<sup>4</sup> *De Wütz v. Hendricks* (1824), 2 Bing. 314. “It [is] contrary to the law of “nations (which in all cases of international law is adopted into the municipal Code “of every civilized country) for persons in England to enter into engagements to “raise money to support the subjects of a Government in amity with our own, in “hostilities against their Government, and . . . no right of action could “arise out of such a transaction.” *Ibid.*, 315, 316, judgment of Best, C. J.



France, for the supply of money to raise a rebellion in Alsace against the German Government, then in amity with the British Crown. The enforcement of the contract (*semble*) is opposed to English interests of State, and the contract is invalid.

3. *X* in France enters into an agreement with *A* that *A* shall conduct an action for *X* in England, on the terms of *A* being paid for his work by a share of the damages, if any, to be recovered by *X* in the action. Such an agreement is lawful by the law of France. The contract is opposed to the policy of English law and invalid.<sup>1</sup>

4. In 1857 a husband and wife, British subjects, are domiciled in France. They enter in France into an agreement for the collusive conduct of a divorce suit in England, and for the abandonment by the husband of the custody of his children. The agreement, whether valid by the law of France or not, is opposed to the moral rules upheld by English law and invalid.<sup>2</sup>

5. *X* contracts with *A*, a courtesan, for the price of her prostitution. The contract is lawful in the foreign country where it is made and is to be performed. It is opposed to the moral rules upheld by English law and invalid.<sup>3</sup>

6. *H*, a Frenchman domiciled in France, misappropriates in France moneys of *A*, also domiciled in France. *X*, the wife of *H*, by an agreement made in France, and intended by the parties to be wholly performed in France, agrees to pay *A* by instalments out of her own money the amount so misappropriated by *H*, upon the terms of *A* abstaining from prosecuting *H* in France. The agreement is lawful and valid under French law. It is opposed to the moral rules upheld by English law and invalid.<sup>4</sup>

*Exception 2.*—A contract (whether lawful by its proper law or not) is invalid if the making thereof is

<sup>1</sup> *I.e.*, in England. See *Grell v. Levy* (1864), 16 C. B. (N. S.) 73.

<sup>2</sup> *Hope v. Hope* (1857), 8 De G. M. & G. 731.

Part at least of the agreement is unlawful by the law of the country where it is to be performed. See Pollock (7th ed.), 393.

<sup>3</sup> See *Robinson v. Bland* (1760), 2 Burr. 1077, 1084, dictum of Wilmot, J.; Pollock, Contracts (7th ed.), p. 392.

<sup>4</sup> *I.e.*, in England. See *Kaufman v. Gerson*, [1904] 1 K. B. (C. A.) 591. The decision of the Court of Appeal (which reverses the judgment of Wright, J., [1903] 2 K. B. 114) is open to criticism. See App., Note 3, "Case of *Kaufman v. Gerson*."

unlawful by the law of the country where it is made  
(*lex loci contractus*) (?).<sup>1</sup>

### Comment.

"I put aside," says Lord Halsbury, "... questions in which  
"the positive law of the country forbids contracts to be made.  
"Where a contract is void on the ground of immorality, or is  
"contrary to such positive law as would prohibit the making of  
"such a contract at all, then the contract would be void all over  
"the world, and no civilised country would be called on to enforce  
"it."<sup>2</sup>

"The question of legality may arise," writes Mr. Foote,<sup>3</sup> "with  
"reference to the contracting of the agreement, and not to its  
"performance. The consideration, on one side or the other, may  
"either be an unlawful thing in itself to exchange for any promise,  
"or unlawful with reference to the particular promise for which it  
"is given. There is no authority for saying that the question of  
"legality, in such cases as these, is determined by any other law  
"than that of the place where the contract is entered into, except  
"the dictum in *Robinson v. Bland*."<sup>4</sup> If these statements of the  
law are to be trusted, no contract is valid the *making whereof* is  
unlawful by the law of the country where a contract is made (*lex*  
*loci contractus*).

Exception 2, however, does not apply to the numerous class of  
cases where it is not the *making* of a contract, but the *performance*  
thereof in a given country which is there illegal.<sup>5</sup> The exception,  
further, itself, though sound in principle, does not rest on an  
unassailable foundation of authority.<sup>6</sup>

<sup>1</sup> See Foote, pp. 385, 386, with which contrast Nelson, p. 266. Compare Intro.,  
General Principle No. I., p. 23, *ante*, and General Principle No. II. (C), p. 34,  
*ante*.

<sup>2</sup> *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 336, per Halsbury, C.

<sup>3</sup> Foote, p. 385.

<sup>4</sup> 2 Burr. 1078.

<sup>5</sup> Compare Wharton, ss. 486, 487.

<sup>6</sup> "It does not serve to invalidate a contract, the law of the obligation of which  
"is to be sought in some other country, that it is illegal and void in substance by  
"the law of the place where it is made." Nelson, p. 266. If, as would appear at  
first sight, these words are meant to contradict the principle laid down in Excep-  
tion 2, I am unable to agree with Mr. Nelson's statement of the law. But it is  
very probable that he refers to the illegality of the *performance* of a contract at the  
place where it is made, and not to the illegality of the *making* of it there. If so, he  
may not disagree with the view embodied in Exception 2.

Illustration.

*X* and *A* contract for the sale and delivery in England by *X* to *A* of spirituous liquors. The contract is made in a foreign country where it is unlawful not only to sell spirituous liquors, but to contract for their sale. The parties are Englishmen domiciled in England. Such a contract may be unlawful and invalid in England, but this is doubtful.<sup>1</sup>

*Exception 3.*<sup>2</sup>—A contract (whether lawful by its proper law or not) is, in general, invalid in so far as

- (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*); or
- (2) the contract forms part of a transaction<sup>3</sup> which is unlawful by the law of the country where the transaction is to take place.

This exception (*semble*) does not apply to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign<sup>4</sup> country not forming part of the British dominions.<sup>5</sup>

<sup>1</sup> See App., Note 19, "What is the Law determining the Essential Validity of a Contract?"

<sup>2</sup> Foote (3rd ed.), pp. 381—385. Compare Westlake (4th ed.), pp. 280—284; *Robinson v. Bland* (1760), 2 Burr. 1077, 1078; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 369. Compare Intro., General Principle No. II. (C), p. 34, *ante*.

"An obligation is invalid everywhere if the transaction which constitutes the "subject of the obligation is an act which is forbidden at the place that is selected "as, or is necessarily presumed to be, the place of performance." Bar (Gillespie's transl., 2nd ed.), p. 557.

<sup>3</sup> *Biggs v. Lawrence* (1789), 3 T. R. 454; *Clugas v. Penaluna* (1791), 4 T. R. 466; *Waymell v. Reed* (1794), 5 T. R. 599; 2 R. R. 675; *Lightfoot v. Tenant* (1796), 1 B. & P. 552. Compare Leake, Law of Contracts (4th ed.), pp. 544—546.

<sup>4</sup> "Foreign" in this Digest means not English (see pp. 67, 71, *ante*). Hence a country such as Victoria, which forms part of the British dominions, is a foreign country. For meaning of "country," see pp. 67, 69—71, *ante*. For meaning of "British dominions," see p. 68, *ante*.

<sup>5</sup> *Planché v. Fletcher* (1779), 1 Doug. 238; *Boucher v. Lawson* (1735), Cas. temp. Hardwicke, 85, 89, 195; *Simeon v. Bazett* (1813), 2 M. & S. 94; *Bazett v. Meyer* (1814), 5 Taunt. 824. Compare Nelson, p. 266, and Bar (2nd ed.), note by Gillespie, pp. 559, 560. See *Gelot v. Stewart* (1871), Ct. Sess. Rep. (3rd ser.), ix. 1057; *Clements v. Macaulay* (1866), Ct. Sess. Rep. (3rd ser.), iv. 583.

## Comment.

This Exception applies to any contract to be performed in England, or forming part of a transaction which is to take place in England.<sup>1</sup> An English Court will not enforce a contract which directly or indirectly violates the law of England.

Exception 3 must, again, in general apply to any contract, wherever made, the performance whereof would directly or indirectly violate the law of a foreign country where the contract is to be performed, or a transaction of which it forms a part is to be carried out; an English Court will not, in general, enforce a contract which violates, or tends to the violation of, the laws of a foreign country within the limits thereof. Hence an agreement made either in England or in Germany for the doing in France of an act (*e.g.*, the founding of a lottery) forbidden by French law would not support an action in England for breach of contract, or, in other words, the contract would be invalid in England.<sup>2</sup>

Exception 3, however, does not, it would appear, apply to contracts which directly or indirectly violate the revenue laws of countries, such as France or Italy, which do not form part of the British dominions. There is certainly authority for the doctrine that the

<sup>1</sup> See Westlake, p. 283, and compare Exception 1, p. 549, *ante*. As regards England, a contract falling under Exception 3 must usually fall under Exception 1.

<sup>2</sup> *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, suggests the conclusion that an English contract to be performed in France, the performance whereof is, at the time when the contract is made, lawful by French law, may be valid in England, even though at the time for the fulfilment of the contract the performance thereof is forbidden by French law. This inference is suggested by the head-note to the report of *Jacobs v. Crédit Lyonnais*, and by some expressions in the case, but is (it is submitted) erroneous. *Jacobs v. Crédit Lyonnais* only decides that a person who enters into an English contract—*i.e.*, a contract governed by the law of England—is not excused for its non-performance in France by circumstances which take place after the contract is made, and afford a legal excuse for non-performance under French, though not under English, law. It does not appear from the case that it would have been illegal under French law to have shipped the cargo, but only that the shipping was prevented by *force majeure*—namely, by the action of the rebels. This hindrance was a valid excuse according to French law, but not according to English law; hence, in an English Court, it could not be a valid defence for non-performance of an English contract. If the shipment had been a violation of French law this would apparently have been a valid excuse in an English Court for the non-shipment of the cargo—*i.e.*, the non-performance of the contract.

When the Government of a foreign country where a contract is to be performed—*e.g.*, a cargo to be loaded by one party, and taken on board ship by the other party—prevents the performance of the contract on both sides, each party is excused from performing his part of the contract. *Cunningham v. Dunn* (1878), 3 C. P. D. (C. A.) 443; *Ford v. Cotesworth* (1870), L. R. 5 Q. B. (Ex. Ch.) 544.

law of England does not pay any regard to the mere revenue laws of a strictly foreign State.<sup>1</sup> The English decisions, however, which support this doctrine are mostly not of a recent date, and its validity may be open to question; the doctrine, however, can apparently have no application to the revenue laws of any country, such as Victoria, which forms part of the British dominions.

### Illustrations.

1. *X* contracts with *A* to smuggle goods into England. *X* and *A* are French citizens. The contract is made in France. It is invalid.<sup>2</sup>

2. *A* and *B* are partners, of whom *A* lives in Guernsey. *A*, on behalf of the firm, sells goods to *X* in Guernsey. The goods are delivered by *A* to *X*, and are packed by *A* in a particular way for smuggling into England. *B*, who lives in England, knows nothing of the sale. The contract is invalid.<sup>3</sup>

3. In 1796 *X* gives a bond to *A* for the price of goods agreed to be sold and delivered in London by *A* to *X*, and to be by *X* shipped to Ostend and thence reshipped for India, there to be trafficked with, contrary to the statute 7 Geo. I. c. 21, then in force. The bond is invalid.<sup>3</sup>

4. *X* and *A* make in France a contract relating to litigation in England. The contract is, under English law, bad on the ground of champerty. The contract is invalid.<sup>4</sup>

5. *X* contracts in England with *A* to smuggle goods into Victoria. The contract is invalid.

6. *X* contracts in England with *A* to set up a lottery in a foreign country, where the maintenance of a lottery is unlawful. The contract is invalid.

7. *X* contracts with *A* in England to smuggle goods into France. The contract (*semble*) is valid, and an action for the breach thereof can be maintained in England.<sup>5</sup>

<sup>1</sup> See p. 554, note 2, *ante*.

<sup>2</sup> *I.e.*, in England. *Biggs v. Lawrence* (1789), 3 T. R. 454; *Clugas v. Penaluna* (1791), 4 T. R. 466.

<sup>3</sup> *Lightfoot v. Tenant* (1796), 1 B. & P. 552. But contrast *Pellecat v. Angell* (1835), 2 C. M. & R. 311.

<sup>4</sup> *Grell v. Levy* (1864), 16 C. B. (N. S.) 73.

<sup>5</sup> See p. 554, note 2, *ante*.

(C) *THE INTERPRETATION AND OBLIGATION OF CONTRACT.*

RULE 152.<sup>1</sup>—The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract.<sup>2</sup>

## Comment.

The laws of different countries differ as to the incidents which they attach to a given contract. The real effect, therefore, of a contract, *i.e.*, what is the true meaning thereof and what are the rights or obligations of the parties thereto, cannot be determined until we have answered the question, what is the law by reference to which the contract is to be interpreted, explained, or construed?

The one general principle which the law of England supplies for the answer to this inquiry is, "that the rights of the parties to a contract are to be judged of by that law by which they intended [to bind], or rather by which they may justly be presumed to

<sup>1</sup> See Intro., General Principle No. 6, pp. 59, 60, *ante*; Foote, pp. 390—401; Story, ss. 263—322; Westlake, pp. 274—282; Savigny, ss. 369—374 (Guthrie's transl., 2nd ed.), pp. 194—252.

It may be noted that Savigny's views do not at bottom greatly differ from those of Story. Both entirely agree in the principle that the test by which to determine the proper law of a contract is the presumed intention of the parties, and this principle has been now fully adopted by our Courts. *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Chamberlain v. Nupier* (1880), 15 Ch. D. 614; *The Gaetano* (1882), 7 P. D. (C. A.) 137; *Chartered Bank of India v. Netherlands Co.* (1882), 9 Q. B. D. 118; (1883), 10 Q. B. D. (C. A.) 521; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321; *The August*, [1891] P. 328, 340. Compare *Chatenay v. Brazilian, &c. Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79. See *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399, especially pp. 405—407, judgment of Esher, M. R.; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202. Both in reality determine the intention of the parties mainly by reference to the law of the country where it is to be performed (*lex loci solutionis*). See especially Story, s. 280. The difference between them is that, where there is no other ground for determining what is the proper law of a contract, Savigny prefers the *lex domicilii* of the debtor, whilst Story, following the English decisions, prefers the *lex loci celebrationis*, or law of the country where the contract is made. See App., Note 5, "Preference of English Courts for *lex loci contractus*." *South African Breweries, Ltd. v. King*, [1899] 2 Ch. 173; [1900] 1 Ch. (C. A.) 273. Cf. *Royal Exchange Assurance Corporation v. Sjörforsakrings Vega*, [1901] 2 K. B. 567; [1902] 2 K. B. (C. A.) 384; *Spurrier v. La Cloche*, [1902] A. C. 446.

<sup>2</sup> As to meaning of "proper law of a contract," see Rule 146, p. 529, *ante*.

“have bound themselves.”<sup>1</sup> “You must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract”;<sup>2</sup> in other words, the meaning and effect of every contract depends upon the law by which the parties intended it to be governed, *i.e.*, upon its “proper law.”

This general principle applies both to the *interpretation* or explanation of a contract and to the *obligation* of a contract, *i.e.*, the rights and obligations of the parties under it.

*Interpretation.*—That a contract must be explained in accordance with its proper law, in so far as its meaning depends upon technical legal terms or upon rules of law, is almost self-evident.<sup>3</sup> The aim of a Court, when called upon to interpret a contract, must be to give to it the sense which was affixed to the contract by the parties when entering into it. But if the law to which the contracting parties looked (*i.e.*, the proper law of the contract) be disregarded, a sense may be given to the terms of their agreement totally different from the sense which they were intended to bear. Thus, if *H* and *W* execute in England a marriage settlement, meant to be carried out in Scotland and to be governed by Scotch law, the very meaning of the terms used, no less than the general effect of the contract, will be misunderstood unless the Court called upon to construe the settlement has regard to the law of Scotland.<sup>4</sup>

*Obligation.*—The rights, again, and obligations under a contract of the parties thereto, no less than the meaning of the terms employed therein, must be determined with reference to the law which the parties had in view when they came to an agreement, *i.e.*, the proper law of the contract. For if a contract made with a view to the law of one country be construed in accordance with the law of some other country, it is all but certain that the end of the contract will not be attained, but that one or each of the parties

<sup>1</sup> *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 123, per Willes, J. Compare *Chamberlain v. Napier* (1880), 15 Ch. D. 614, 630, judgment of Hall, V.-C.; *Chartered Bank of India v. Netherlands Co.* (1883), 10 Q. B. D. (C. A.) 521, 540, judgment of Lindley, L. J.; *The Gaetano* (1882), 7 P. D. (C. A.) 137, 146, judgment of Brett, L. J.; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 601, per Curiam; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 340, judgment of Fry, L. J.; *The August*, [1891] P. 328, 340, judgment of Sir J. Hannen.

<sup>2</sup> *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 336, per Halsbury, C.

<sup>3</sup> See *Intro.*, pp. 59—62, *ante*.

<sup>4</sup> See *Chamberlain v. Napier* (1880), 15 Ch. D. 614.

will acquire rights or incur liabilities different from those which the agreement was intended to confer or impose.<sup>1</sup>

Rule 152, and the grounds on which it rests, are not hard to understand. The true difficulty lies in answering a question to which, when applied to a given case, the Rule immediately gives rise: On what principles are we to determine what was the intention of the parties to a contract in reference to the law by which it should be governed? The answer to this question may often be hard to find, and this for two reasons. Under the complicated transactions of modern life, a contract which contains a foreign element may be so connected with different countries as to suggest not only two, but as many as five or six, different laws as the law by which the parties intended a contract to be governed, or, in other words, as the proper law of the contract. Suppose, for example, that *A*, an Englishman, charts a French ship from *X*, its French owner, at a Danish port in the West Indies, for the carriage of the goods of *A* from Hayti to Genoa, and that the ship, under stress of weather, puts into a Portuguese port, where transactions take place which result in a loss to *A*, and that *A* claims damages from *X*, alleged to be due under the contract between them. In this position of things, which is suggested by a reported case, there are six countries the law of any one of which may, conceivably, at any rate, have been intended by the parties to govern the contract, at least in so far as to determine the question at issue between *A* and *X*. The Court, therefore, when called upon to decide what are *A*'s rights, has before it six different laws from which to select the law on which his rights depend. The intention of the parties, again, as to the law by which a contract is governed, is not generally expressed in the contract itself. What is more, it has often no real existence. If we could look into their minds, we should find that they had formed no definite purpose as to the law which should govern their rights under circumstances of which they did not anticipate the occurrence. Here, as in other branches of law, an inquiry into the intention of the parties is really an inquiry, not into the actual intention of *X* and *A*, for it possibly never had any real existence, but into the intention which would have been formed by sensible persons in the position of *X* and *A* if their attention had been directed to contingencies which escaped

<sup>1</sup> Rule 152 is nothing else than the most obvious application of General Principle No. VI. (Intro., p. 59, *ante*), which itself is an immediate result of General Principle No. I. (Intro., p. 23, *ante*).



their notice. When this is the case, the law which will be applied by any tribunal to the interpretation of a contract "is that which will most frequently and most naturally be assumed by ignorant parties to a contract as that by which their [rights and] liabilities are defined."<sup>1</sup> We are then driven back upon the further question, how are we to determine what is this natural assumption? The reply is, that a variety of circumstances must be considered, such as the nature of the contract, the customs of business, the place where the contract is made or is to be performed, and the like, any one of which may suggest conclusions as to the law likely to be intended by the parties; and English judges have constantly declined to tie themselves down by any rigid or narrow rule for determining the intention of the parties, or, in effect, the proper law of the contract.

The conclusions, however, at which the Courts have arrived in particular cases, though based on the circumstances of each case, are not the result of mere guesswork. They lead to, and in turn are the result of, certain maxims by which English Courts are, it is submitted, in the main guided when called upon to determine the proper law of a given contract.

These maxims are formulated in Sub-Rules 1 to 3.

The true nature of these Sub-Rules, if they are to be of any utility whatever, must be carefully borne in mind. They are in no sense rigid canons of construction from which a Court will not deviate. They are rather presumptive rules of evidence which are in fact frequently followed by English judges, but which are not in any degree irrebuttable, and are liable to be displaced by circumstances of any kind which in a given case influence the opinion of the Court.<sup>2</sup>

Two further observations are worth notice:—

In particular classes of contracts<sup>3</sup> custom has established<sup>4</sup> certain definite rules as to the presumed intention of the parties. Where such established rules exist, recurrence to general presumptions is usually unnecessary, and our Sub-Rules are for the most part superfluous. But this does not invariably hold good, for the presumption established by custom may be rebutted, *e.g.*, by the

<sup>1</sup> Foote (3rd ed.), p. 391.

<sup>2</sup> See especially *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 601, judgment of Bowen, L. J.

<sup>3</sup> For such contracts, see chap. xxvi., p. 572, *post*.

<sup>4</sup> See *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115.

expressed intention of the parties or by the circumstances of the case.<sup>1</sup>

In certain rare instances, rules as to the intention of the parties are in effect established by statute.<sup>2</sup> Such statutory enactment, in so far as it applies, is decisive.

*Sub-Rules for determining the Proper Law of a Contract  
in Accordance with the Intention of the Parties.*

SUB-RULE 1.<sup>3</sup>—When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption.

**Comment.**

As the proper law of a contract is fixed by the intention of the parties, their expressed intention with regard to it must (in general) be decisive.<sup>4</sup>

**Illustrations.**

1. X, an English underwriter, executes in England a policy of insurance of which it is one of the express terms that it shall be

<sup>1</sup> Compare, particularly, *Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 540, judgment of Lindley, L. J.

<sup>2</sup> See Bills of Exchange Act, 1882, s. 72, and Rules 162—165, pp. 585—601, *post*.

<sup>3</sup> *Hamlyn v. Talisker Distillery*, [1894] A. C. 202. Compare Savigny, ss. 369, 370 (Guthrie's transl., 2nd ed.), pp. 194, 197, and s. 372, p. 221, especially note A, p. 227. But the bankruptcy law of the country (*e.g.*, New York) the law whereof is embodied in and forms part of the contract, is not—at any rate, where one of the parties to the contract is domiciled in England—made part of the contract. *Ex parte Dever* (1887), 18 Q. B. D. (C. A.) 660.

<sup>4</sup> Not quite invariably. Parties, whilst really contracting with reference to one law (*e.g.*, the law of England), may conceivably, with a view to give validity to a contract which English law treats as invalid, assert their intention to contract with reference to another law, *e.g.*, the law of Scotland. The Courts must in this case determine the essential validity of the contract with reference to the law under which the parties really intended to contract, *i.e.*, the law of England. See App., Note 19, “What is the Law determining the Essential Validity of a Contract?”

construed and applied in accordance with French law. The law of France is the proper law of the contract.<sup>1</sup>

2. *X* and *A* enter into a contract in London which is to be performed, except as to the arbitration clause, in Scotland. It is an express term of the contract that any dispute arising out of it "shall be settled by arbitration by two members of the London "Corn Exchange in the usual way." As to this arbitration clause the law of England is the proper law of the contract.<sup>2</sup>

SUB-RULE 2.—When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.<sup>3</sup>

### Illustrations.

1. *A*, an Englishman, ships a cargo on board the ship of *X & Co.*, a Dutch company registered under Dutch law. The company, however, consists of the same persons as an English company registered under English law. The goods are shipped at Singapore, for this purpose an English port, under a bill of lading in the English form and expressed in English. The cargo is damaged in a collision between the ship on which it is carried and another ship of *X & Co.* The proper law of the contract (bill of lading) is the law of England,<sup>4</sup> and the presumption which would otherwise exist, that the parties submitted themselves to Dutch law as the law of the flag, is rebutted.<sup>5</sup>

<sup>1</sup> See *Greer v. Poole* (1880), 5 Q. B. D. 272. "It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part, according to the law of any foreign State, as if it had been made in and by a subject of the foreign State, and the policy in question does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel." *Ibid.*, p. 274, per Curiam.

<sup>2</sup> *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

<sup>3</sup> "In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties." See *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 601, judgment of Bowen, L. J.

<sup>4</sup> *Chartered Mercantile Bank of India v. Netherlands Co.* (1883), 10 Q. B. D. (C. A.) 521.

<sup>5</sup> *Ibid.*, especially pp. 529, 530, judgment of Brett, L. J., and p. 540, judgment

2. An agreement in writing executed in 1895 at Johannesburg, in the South African Republic, is made between *A & Co.*, a company having its registered office in London, but carrying on business in South Africa, and *X*, a British subject resident in South Africa. *X* thereby agrees to serve the company, as brewer or otherwise, in its business carried on at Johannesburg, or elsewhere in South Africa; by the agreement provision is also made for his residence at Johannesburg, but the agreement is framed in the English language and is in an English form. The rights of the parties under the agreement are governed by the law of the South African Republic.<sup>1</sup>

3. An Englishman domiciled in England marries, in Scotland, a Scotchwoman domiciled in Scotland. Before their marriage they have executed in Scotland a marriage contract (settlement) in the Scotch form. It is part of this contract that, on the death of the husband, his heirs, &c. shall pay to his wife, in case she should survive him, an annuity of 200*l.*, and further pay after his death to the children (if any) of the marriage the sum of 3,000*l.* The husband and wife live after the marriage in England. The law of Scotland is the proper law of the contract, and when, on the death of the husband, his estate is found not to be enough to satisfy both the annuity payable to the wife and the sum of 3,000*l.* payable to the children, the rights of the wife and the children respectively are governed by the law of Scotland.<sup>2</sup>

4. An Englishman, domiciled in England, marries a Scotchwoman domiciled in Scotland. A marriage settlement is, before the marriage, executed in Scotland by the intended husband and wife. In the settlement, trusts are declared in the English form of the husband's real estate in England. The proper law of the contract as regards such trusts is the law of England.<sup>3</sup>

5. *X & Co.*, a London firm, contract in London to sell to *A & B*, also a London firm, 20,000 tons of esparto, to be shipped by a French company at an Algerian port, on board vessels to be provided by *A & B*, who are to pay for the esparto in London in

of Lindley, L. J., with which contrast *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The August*, [1891] P. 328; and as to this presumption, and the meaning of the term "law of the flag," see "Contract of Affreightment," Rules 156, 157, pp. 575, 576, *post*.

<sup>1</sup> *South African Breweries, Ltd. v. King*, [1900] 1 Ch. (C. A.) 273.

<sup>2</sup> *In re Barnard* (1887), 56 L. T. 9; W. N. (1887), p. 8.

<sup>3</sup> *Chamberlain v. Napier* (1880), 15 Ch. D. 614. See, as to the "proper law of a contract" with regard to immovables, chap. xxvi., Rule 154, p. 572, *post*.

cash on or before the arrival of the ships at the port of destination. English law is the proper law of the contract.<sup>1</sup>

SUB-RULE 3.—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—

*First Presumption.*<sup>2</sup>—*Primâ facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

*Second Presumption.*—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*).

#### Comment.

Both these presumptions are grounded on the probable intention<sup>3</sup> of the parties.

*As to the first presumption.* “The broad rule is, that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties.”<sup>4</sup>

<sup>1</sup> *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589.

This case might also be brought under Sub-Rule 3, 1st presumption. See “Contracts with regard to Movables,” Rule 155, p. 574, *post*.

<sup>2</sup> Compare *Story*, ss. 242, 280; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, especially p. 600, judgment of Bowen, L. J.; *P. & O. Co. v. Shand* (1865), 3 Moore, P. C. (N. S.) 272; *Scott v. Pilkington* (1862), 2 B. & S. 11; 31 L. J. Q. B. 81.

<sup>3</sup> See pp. 558—560, *ante*.

<sup>4</sup> *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 600, per Bowen, L. J.; *South African Breweries, Ltd. v. King*, [1900] 1 Ch. (C. A.) 273. See *Story*, s. 242.

"One inference which has always been adopted is this: If a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that the contract, as to its construction and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made."<sup>1</sup>

"It is . . . generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended [to adopt], or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention."<sup>2</sup>

These dicta lay down the undoubted rule of English law that the meaning of a contract and the obligations arising under it are *primâ facie* and presumably governed by the law of the country where the contract is made (*lex loci contractus*). The language indeed of judges and writers of authority has sometimes produced the impression that something like exclusive authority is attributed by our Courts to the law of the country where the contract is completed. But this idea is erroneous. In many instances, as is apparent from our second presumption, the meaning and incidents of a contract are governed by the law of the place of performance.

The distinct and still strong preference, however, of English Courts for the *lex loci contractus*<sup>3</sup> must never be forgotten. This preference leads to the result that in all cases of doubt, and especially where a contract is made in England, our Courts hold that the proper law of the contract is the law of the country where the contract is made.

*As to the second presumption.* The assumption, which in many cases is sound, that the proper law of a contract is the law of the country where it is made (*lex loci contractus*), pre-supposes in general that "the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the

<sup>1</sup> *Chatenay v. Brazilian Submarine Tele. Co.*, [1891] 1 Q. B. (C. A.) 79, 82, judgment of Esher, M. R. Compare *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399, 405, judgment of Esher, M. R., cited pp. 439, 440, *ante*.

<sup>2</sup> *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122, per Curiam.

<sup>3</sup> See App., Note 5, "Preference of English Courts for *lex loci contractus*."

“presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance.”<sup>1</sup>

“The business sense of all business men,” says Lord Esher, “has come to this conclusion, that, if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. . . . Therefore, the law has said that if the contract is to be carried out in whole in another country it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.”<sup>2</sup>

“When two parties,” says Lord Watson, “living under different systems of law, enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract, and the course of performing its stipulations contemplated by the parties; and amongst these considerations the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum and the place of performance in another.”<sup>3</sup>

The effect of these dicta may be thus summed up: The proper law of a contract is indeed *prima facie* the law of the country where it is made (*lex loci contractus*); yet when a contract is made in one country, but is wholly or partially to be performed in another,

<sup>1</sup> Story, s. 280. Compare *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 600, language of Bowen, L. J.

<sup>2</sup> *Chatenay v. Brazilian Submarine Tele. Co.*, [1891] 1 Q. B. (C. A.) 79, 82, 83, judgment of Lord Esher, M. R.

<sup>3</sup> *Hamlyn v. Talisker Distillery*, [1894] A. C. 202, 212, per Lord Watson. Compare Savigny, s. 372, p. 222.

then great weight will be given to the law of the place of performance (*lex loci solutionis*), as being probably the proper law of the contract, in regard, at any rate, to acts to be done there.

Our second presumption covers at least two different cases:—

*First case.* A contract is made in one country and is to be wholly performed in another, as where *X* and *A* enter into an agreement in Scotland, *e.g.*, for the sale of goods by *X* to *A*, and the whole of the contract is to be performed on both sides in England. The law of England (*lex loci solutionis*) is, then, presumably the proper law of the contract as a whole, and certainly governs every incident having reference to the mode of performance, *e.g.*, the delivery of and the payment for the goods.<sup>1</sup>

*Second case.* A contract is made in one country, and is to be performed, as regards the obligations of one of the parties, wholly in that country, and as regards the obligations of the other wholly in another country, as where *A* agrees to deliver goods to *X* in Liverpool, and *X* agrees to pay for them in New York. The contract may be treated as two contracts,<sup>2</sup> the one to be performed by *A* in England and the other by *X* in New York. It is, then, reasonable at any rate to assume (though the presumption is by no means conclusive) that on the one hand the delivery, etc. of the goods (*i.e.*, the performance of *A*'s share of the contract) is governed by the law of England, and on the other hand the payment for the goods, *i.e.*, the performance of *X*'s part of the contract, is governed by the law of New York.<sup>3</sup>

### Illustrations.

#### *Presumption 1.*

1. *X*, a Frenchman domiciled in France, incurs in London a debt to *A* for goods there sold by *A* to *X*. English law (*lex loci contractus*) is the proper law of the contract.

<sup>1</sup> Whether the law of Scotland may not determine what are the legal excuses for non-performance (?)

<sup>2</sup> Many difficulties as to the proper law of a contract are removed by noticing that what is called "a contract" is often in effect a set of two or more contracts, and the proper law of these several contracts may be different. This is specially noticeable in regard to the different contracts which may be embodied in a single bill of exchange. See chap. xxvi., Rule 163 (2), p. 592, *post*.

<sup>3</sup> As to the somewhat different case of "contracts for through carriage," see chap. xxvi., Rule 158, p. 580, *post*.



2. A note is made and is payable in England. English law (*lex loci contractus*) is the proper law of the contract.<sup>1</sup>

3. X, an Englishman carrying on business in England, while in New York gives N, of New York, a letter of credit to the following effect: "You have authority to draw exchanges upon me, and all such exchanges will be duly honored." This letter is shown to A, who, on the faith thereof, purchases a bill drawn by N on X. X does not accept the same. X is not liable to A by the law of England for not accepting the bill, but he is liable by the law of New York. The law of New York (*lex loci contractus*) is the proper law of the contract.<sup>2</sup>

4. A, an Englishman, contracts in England with X & Co., an English company, for the carriage by them of goods from England to Mauritius on a British ship. A takes a ticket at Southampton which contains a condition limiting the liability of the company. A's goods are lost in Egypt. The condition, according to English law, covers the liability of X & Co. According to the law of Mauritius (French law), it does not cover their liability. English law (*lex loci contractus*) is the proper law of the contract.<sup>3</sup>

5. X, an Englishman, makes a contract in London with A, a Scotchman, under which A is to act as traveller for X in Scotland. *Semble*, English law is the proper law of the contract (?).<sup>4</sup>

<sup>1</sup> See *Kearney v. King* (1819), 2 B. & Ald. 301; *Sprole v. Legge* (1822), 1 B. & C. 16. In this as in many other cases the *lex loci contractus* is also the *lex loci solutionis*.

<sup>2</sup> "It [is] contended, on the part of the defendants [X], that, as the thing contracted for, namely, the acceptance of the bills, was to be performed in this country, the law of England, as that of the place of performance, ought to prevail. We are of a contrary opinion, it appearing to us that the question of the defendant's liability must be determined by the *lex loci contractus*. The question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance. It relates entirely to the effect of the transaction at New York, and the document signed there by one of the defendants on behalf of the rest (his authority to bind the partnership not being called in question) in creating a liability in the defendants to the purchasers of the bills, which by the document the defendants were bound to accept in favour of [N]." *Scott v. Pilkington* (1862), 31 L. J. Q. B. 81, 90, per Cockburn, C. J. See 2 B. & S. 11, 43, 44.

<sup>3</sup> *P. & O. Co. v. Shand* (1865), 3 Moore, P. C. N. S. 272. Compare *Nugent v. Smith* (1875), 1 C. P. D. 19; and (1876) (C. A.) 423. See as to "Contract for Through Carriage of Person or Goods," Rule 158, p. 580, *post*.

<sup>4</sup> *Arnott v. Redfern* (1825), 2 C. & P. 88.

*Presumption 2.*

6. *X* contracts a debt to *A* in Jamaica which is made payable in London. English law (*lex loci solutionis*) is, at any rate as regards payment, the proper law of the contract.<sup>1</sup>

7. In 1870 a bill of exchange is drawn by *X* in England on *N & Co.*, French subjects resident in Paris, and is indorsed in England by *X* to *A*. The bill is accepted by *N & Co.* in Paris, and is on the face of it payable on 5th October, 1870. In consequence of the Franco-German war, the time for payment is under French law enlarged till 5th September, 1871. French law is the proper law of the contract, and the bill, as against all the parties thereto, is payable on 5th September, 1871.<sup>2</sup>

8. *X* in England charters *A*'s ship for carriage of coals to Algiers. It is part of the terms of the charter party that the ship shall be unloaded at a certain rate *per diem*, and that *X* shall pay 5*l.* *per diem* for detention from the time of the ship being ready to unload and "in turn to deliver." Delivery is delayed by the French port regulations. In reference to delivery the proper law of the contract is the French law as to unloading at the port (*lex loci solutionis*).<sup>3</sup>

9. *X*, an Englishman, under a charter party made between him and *A*, a foreigner, at Riga, loads *A*'s ship with a cargo of timber to be delivered in the port of Liverpool. A given number of lay days are allowed for the unloading. By the general law, the lay days commence from the time when the ship arrives in dock; but by the custom of the port of Liverpool the lay days, in case of the timber ship, begin only from the mooring of the ship at the quay, where alone by dock regulations the ship can discharge cargo. The commencement of the lay days is governed by the custom of the port of Liverpool (*lex loci solutionis*)<sup>4</sup> as the proper law of the contract.

<sup>1</sup> Compare *Cash v. Kennion* (1805), 11 Ves. 314, with *Manners v. Pearson*, [1898] 1 Ch. (C. A.) 581.

<sup>2</sup> *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525. See as to Bills of Exchange, Rules 162—164, pp. 585—598, *post*.

<sup>3</sup> *Robertson v. Jackson* (1845), 2 C. B. 412; 15 L. J. C. P. 28.

<sup>4</sup> *Norden Steam Co. v. Dempsey* (1876), 1 C. P. D. 654. Conf. *Atwood v. Sellar* (1880), 5 Q. B. D. (C. A.) 286.

(D) *DISCHARGE OF A CONTRACT.*

RULE 153.<sup>1</sup>—The validity of the discharge of a contract (otherwise than by bankruptcy)<sup>2</sup> depends upon the proper law<sup>3</sup> of the contract<sup>4</sup>(?).

(1) A discharge in accordance with the proper law of the contract is valid.

(2) A discharge not in accordance with the proper law of the contract is not valid(?).

Comment.

On principle, the validity or invalidity of the discharge of a contract ought to depend upon the proper law of the contract, *i.e.*, upon the law to which the parties, when contracting, intended to submit themselves. If, for example, *X* and *A*, French citizens, enter into a contract in France to be performed in France, and which therefore is clearly subject to French law, the question whether an act on the part of *X*, *e.g.*, some act which *X* alleges amounts to payment, does or does not discharge *X* from liability, must (it is conceived) be determined by reference to French law, and this appears to be the view maintained by English Courts and by writers such as Story. There is, however, a lack of decisive authority on the subject.

All that can be absolutely laid down is, that, when a contract is made and to be performed in the same country, anything which discharges the liability under the law of that country will be held a good discharge by our Courts. “The general rule is, that a “defence or discharge, good by the law of the place where the “contract is made or is to be performed, is to be held of equal

<sup>1</sup> Story, ss. 330—334, 342, with which read s. 280; Nelson, pp. 278, 279; Foote, pp. 457, 458, 463—465.

In order to understand Story's view, it must be noted that his habit is to speak of a contract as governed by the law of the place where it is made, but that he often means by this the law of the place where it is made and is to be, or may be, performed.

<sup>2</sup> As to Discharge under a Bankruptcy, see chap. xviii., Rules 114—117, pp. 435—441, *ante*, and compare *Ex parte Dever* (1887), 18 Q. B. D. (C. A.) 660.

<sup>3</sup> For meaning of “proper law,” see p. 529, *ante*.

<sup>4</sup> *Warrender v. Warrender* (1834), 9 Bli. 89, 125, language of Brougham, C.; *Ralli v. Dennistoun* (1851), 6 Ex. 483; 20 L. J. Ex. 278; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234.

"validity in every other place where the question may come to be litigated."<sup>1</sup> So in a particular case it is laid down that, "inasmuch as it appeared that the accord and satisfaction was sufficient according to the law of the country where the bill was negotiated and the payment was made, the bill being then due and payable and in the hands of the true holder, the defence [of accord and satisfaction according to that law] was good;"<sup>2</sup> and more generally it has been said: "There is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability and does not merely interfere with the remedies or course of procedure<sup>3</sup> to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries."<sup>4</sup>

On the whole, therefore, we may fairly conclude "that a contractual obligation, which has been extinguished by the law of that country which properly and substantially governs the obligation of the contract, cannot be enforced here,"<sup>5</sup> and that a contractual obligation which has not been so extinguished can be enforced in England.

### Illustrations.

1. *X*, a Frenchman, incurs in France a debt to *A*, also a Frenchman. *X* is under French law absolutely discharged from all liability to *A*, e.g., by a statute which after the lapse of a given time extinguishes not only the remedy for the recovery of the debt, but the debt itself. *Semble*, the discharge is valid in England.<sup>6</sup>

2. *X* in Austria becomes liable to *A* on a bill of exchange drawn by *A* and accepted by *X* in Austria, and there payable. *X*, on the bill becoming due, owes *A* a sum equivalent to 100%. He

<sup>1</sup> Story, s. 331.

<sup>2</sup> *Ralli v. Demistoun* (1851), 6 Ex. 483, 493, per Parke, B. Compare *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525.

<sup>3</sup> Anything of this nature depends wholly on the *lex fori*. See chap. xxxii., Rule 193, p. 708, *post*.

<sup>4</sup> *Ellis v. M<sup>r</sup> Henry* (1871), L. R. 6 C. P. 228, 234, per Curiam. Compare *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399, 405, language of Lord Esher, cited pp. 439, 440, *ante*.

<sup>5</sup> Nelson, p. 279.

<sup>6</sup> Compare *Huber v. Steiner* (1835), 2 Bing. N. C. 202.

satisfies *A*'s claim by the payment of 90*l.*, which *A* accepts in satisfaction of the debt. This would not be an accord and satisfaction under English, but is an accord and satisfaction under Austrian law. The accord and satisfaction is a valid discharge of *X*'s debt to *A*.<sup>1</sup>

3. A bill for 100*l.* is drawn and issued in Demerara, but is accepted and payable in England. At the time when the bill matures, the holder owes the acceptor 100*l.* According to the law of Demerara, this operates as a discharge of the bill (by *compensatio*). The drawer is discharged in England.<sup>2</sup>

4. Business is carried on in Queensland by an English company. Resolutions are passed by the company under which certain stockholders become entitled to a cumulative payment of interest at the rate of 6 per cent. per annum in priority to other stockholders. By a subsequent Act of the colonial legislature, a duty in the nature of income tax is imposed on all dividends or interest paid out of assets in the colony to members of any company carrying on business therein, and a duty payable in respect of the amount received by any member is declared a debt due by him to the Crown. The contract between the preference and the ordinary shareholders is an English contract, and the preference stockholders not domiciled in Queensland are entitled to 6 per cent. without any deduction in respect of the colonial duty, *i.e.*, the colonial Act is not a discharge of the debt due under the English contract.<sup>3</sup>

<sup>1</sup> See *Ralli v. Dennistoun* (1851), 6 Ex. 483, 493. Compare *Burrows v. Jemino* (1726), 2 Strange, 733.

<sup>2</sup> *Allen v. Kemble* (1848), 6 Moore, P. C. 314.

<sup>3</sup> *Spiller v. Turner*, [1897] 1 Ch. 911. Whether it is a discharge as regards preference stockholders domiciled in Queensland?

## CHAPTER XXVI.

## PARTICULAR CONTRACTS.

(A) *CONTRACTS WITH REGARD TO IMMOVABLES.*<sup>1</sup>

RULE 154.<sup>2</sup>—The effect of a contract with regard to an immovable is governed by the proper law<sup>3</sup> of the contract (?).<sup>4</sup>

The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (*lex situs*).<sup>5</sup>

## Comment.

This rule is open to some doubt.<sup>6</sup> It constitutes (if valid) an exception to the general doctrine, that all rights connected with land are to be determined by the *lex situs*.<sup>7</sup>

The limitations, therefore, to our Rule must be noted:—

*First.* Rule 154 does not apply to a conveyance. A contract with regard to land may be governed by its proper law, but a

<sup>1</sup> See Westlake (4th ed.), p. 285; Nelson, p. 277. Contrast Story, ss. 363—365.

<sup>2</sup> *Campbell v. Dent* (1838), 2 Moore, P. C. 292; *Cood v. Cood* (1863), 33 L. J. Ch. 273; *Waterhouse v. Stansfield* (1851), 9 Hare, 234; (1852), 10 Hare, 254. Compare *Mercantile Investment Co. v. River Plate, &c. Co.*, [1892] 2 Ch. 303.

<sup>3</sup> As to meaning of “proper law,” see p. 529, *ante*.

<sup>4</sup> See Exception 1 to Rule 141, p. 510, *ante*.

<sup>5</sup> Compare *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122.

See App., Note 17, “Law Governing Contracts with regard to Immovables.”

As to “Capacity,” see chap. xxiii., p. 501, *ante*; as to “Form,” see chap. xxiii., pp. 502, 503, *ante*.

<sup>6</sup> See, in support of Rule, Westlake (4th ed.), p. 285, and Nelson, p. 277. Contrast, however, Story, ss. 363—365, who perhaps holds that executory contracts respecting real estate or immovables are governed wholly by the *lex situs*, and the language of Lord Mansfield in *Robinson v. Bland* (1760), 2 Burr. 1077, 1079, viz.: “In every disposition or contract where the subject-matter relates locally to “England, the law of England must govern, and must have been intended to “govern. Thus, a conveyance or will of land, a mortgage, a contract concerning “stocks, must be all sued upon in England; and the local nature of the thing “requires them to be carried into execution according to the law here.”

<sup>7</sup> See Rule 141, p. 500, *ante*.

conveyance or transfer of land, or of any interest in land, is certainly governed by the *lex situs*.<sup>1</sup>

*Secondly.* English Courts will not enforce the doing of anything with regard to foreign land which the *lex situs* will not permit to be done.<sup>2</sup>

*Thirdly.* Parties who enter into a contract with regard to land may in general be presumed to contract with a view to the law of the country, *e.g.*, France, where the land is situate. Hence the *lex situs* is in general the proper law of the contract.<sup>3</sup>

#### Illustrations.

1. *X*, an Englishman, residing but not domiciled in Chili, and *A* and *B*, his brothers, Englishmen, residing and domiciled in England, have each of them an interest in certain land in Chili. *X* enters into negotiations with *A* and *B*, which are carried on by correspondence, for the purchase by *X* of *A*'s and *B*'s shares in the land. It is alleged on the part of *X* that the negotiations resulted in a contract whereby both *A* and *B* agreed to sell their share in the land to *X*. It is held by a Court in Chili that *A* did, and *B* did not, contract to sell his interest in the land. The contract is an English contract,<sup>4</sup> and the question whether *B* contracted to sell his share in the land is to be determined in accordance with English law<sup>4</sup> (proper law of contract).

2. *X* and *A* make an agreement in Scotland for the discharge of a mortgage of lands in Demerara by bills payable in Scotland. This is a Scotch contract, since, though referring to lands in Demerara, it is made and to be performed in Scotland. It is governed by, and to be interpreted in accordance with, Scotch law<sup>5</sup> (proper law of contract).

<sup>1</sup> See Story, s. 424, cited p. 500, *ante*; and Westlake (4th ed.), p. 203, cited p. 500, *ante*; *Norton v. Florence Land Co.* (1877), 7 Ch. D. 332, 336. But as to marriage as an assignment of immovables, see pp. 503, 510, 512, *ante*.

<sup>2</sup> *Campbell v. Dent* (1838), 2 Moore, P. C. 292; *Waterhouse v. Stansfield* (1851), 9 Hare, 234; (1852), 10 Hare, 254; Westlake, p. 285. Compare Rule 151, Exception 3, p. 553, *ante*.

<sup>3</sup> See *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122, 123.

<sup>4</sup> For meaning of "English contract," see p. 546, note 3, *ante*. "But then arises this question: The law of which country is it governs the transaction and the actors in it? The right to land in Chili must, no doubt, be determined by their laws; but a contract entered into between three English gentlemen, two of them domiciled and residing in England, and the third residing in Chili, but not having acquired a foreign domicile, must, I think, be governed and construed by the rules of English law." *Cood v. Cood* (1863), 33 L. J. Ch. 273, 278, judgment of Romilly, M. R.

<sup>5</sup> *Campbell v. Dent* (1838), 2 Moore, P. C. 292.

(B) *CONTRACTS WITH REGARD TO MOVABLES.*

RULE 155.<sup>1</sup>—The effect of a contract with regard to a movable is governed by the proper law of the contract.

**Comment.**

Here, again, it is necessary to distinguish between a contract and a transfer or an assignment. A contract, *e.g.*, to sell a movable, is governed by the proper law of the contract, *i.e.*, by the law to which the parties must be taken to have intended, when contracting, to submit themselves. Whether the transfer or the assignment of a movable is valid, and therefore whether a contract to sell operates as a sale, depends, generally at any rate, on the law of the country where the movable is situate<sup>2</sup> (*lex situs*).

**Illustration.**

*X & Co.*, a London firm, contract in London to sell to *A*, a merchant in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board ships to be provided by *A*. The esparto is to be paid for by *A* in London. *X & Co.* fail to deliver the esparto. The failure arises from the fact that at the time for the performance of the contract there is an insurrection, and military operations are being carried on, in Algeria, and the collection and transport of esparto are prevented by circumstances which, according to French law, amount to *force majeure*, and are an excuse for the non-performance of the contract, but which under English law are not a legal excuse for the non-performance of their contract by *X & Co.* English law is the proper law of the contract,<sup>3</sup> and *X & Co.* are liable to pay damages for the non-performance thereof.<sup>4</sup>

<sup>1</sup> *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589. See, as to assignment of movables, chap. xxiv., pp. 518, 528, *ante*; as to capacity to contract, Rule 149, p. 534, *ante*.

<sup>2</sup> See Rules 143—145, pp. 519, 525, *ante*; *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350 (Ex. Ch.); (1858), 3 H. & N. 617; 27 L. J. Ex. 447; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Hooper v. Gumm* (1867), L. R. 2 Ch. 282; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545. Compare, however, *Cochrane v. Moore* (1890), 25 Q. B. D. (C. A.) 57.

<sup>3</sup> See Sub-Rule 3, p. 563, *ante*.

<sup>4</sup> *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589. For an explanation of this case, see note 2, p. 554, *ante*.



(C) *CONTRACT OF AFFREIGHTMENT*.<sup>1</sup>

RULE 156.<sup>2</sup>—The term “law of the flag” means the law of the country<sup>3</sup> whereof a ship carries the flag.

When the flag carried by a ship is that of a State<sup>4</sup> including more than one country, the law of the flag means (*semble*) the law of the country where the ship is registered.<sup>5</sup>

## Comment.

“The law of the flag” is a short expression for the law of the country under the flag of which a ship sails, and to which, therefore, she presumably belongs.<sup>6</sup>

The flag which a ship carries may be the flag of a State, such as the United States, which consists of several countries (*e.g.*, New York, Massachusetts, Louisiana, &c.) governed by different laws. When this is so, the flag does not of itself show what is the country to which the ship presumably belongs, and what, therefore, is the law of the flag. There is, at any rate, American authority for the statement that in this case the law of the flag is the law of the country where the ship is registered.<sup>7</sup>

## Illustrations.

1. A ship carrying the Italian flag is about to sail from Havre for Bombay. The law of the flag is the law of Italy.
2. An American ship, carrying the flag of the United States

<sup>1</sup> See, for nature of contract, 3 Kent, Comm. (12th ed.), ss. 201—251, and compare Westlake (4th ed.), pp. 285—287. See also, as to conflict of laws on the subject of carriage by sea, Carver, “Carriage by Sea,” chap. vii., ss. 201—217.

<sup>2</sup> See MacLachlan (4th ed.), pp. 65, 174; Carver, ss. 203—206. Contrast, however, Westlake (4th ed.), pp. 285, 286.

<sup>3</sup> For the meaning of the term “country,” see pp. 67, 69—71, *ante*.

<sup>4</sup> For the meaning of the term “State,” see pp. 67, 71, *ante*.

<sup>5</sup> Wharton, s. 441 and s. 357.

<sup>6</sup> The country to which a ship in fact belongs is ultimately fixed by the nationality of her owner, and circumstances may exist under which a ship, for some purposes at any rate, belongs to a country of which she does not carry the flag. See *Chartered Bank of India v. Netherlands Co.* (1883), 10 Q. B. D. (C. A.) 521, 534, 537, judgment of Brett, L. J. The term “law of the flag,” therefore, is, by some writers, given a wider sense than that which it receives in Rule 156, and is used as equivalent to the personal law of the shipowner. See Westlake, pp. 285, 286.

<sup>7</sup> Wharton, Conflict of Laws, s. 441 and s. 357.

and registered at New Orleans, is at Liverpool, about to sail for Hamburg. The law of the flag is the law of Louisiana.<sup>1</sup>

RULE 157.<sup>2</sup>—Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (*i.e.*, a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag.

Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply.<sup>3</sup>

#### Comment.

This Rule is an application of Rule 152. The parties to a contract of affreightment, or, using more popular though not quite accurate language, for the carriage of goods by sea on board a particular ship, are presumed, in the absence of evidence to the contrary, to contract with reference to the law of the country to which the ship, from the flag at her masthead, may be seen, or at any rate may be presumed, to belong.<sup>4</sup>

Nor does it necessarily make any difference that, though the ship is a foreign ship carrying a foreign flag, the contract is made in England. It may still in general be presumed that the parties looked to foreign law as determining the effect of their contract.<sup>5</sup>

"*Lloyd v. Guibert*<sup>6</sup> establishes," writes Mr. Carver, "that, where the shipowner's total liability is limited by the law of his own country, in which he is domiciled and under whose flag he sails his ship, that limitation is to be implied in contracts to carry goods in her. Whether the contract be made by the

<sup>1</sup> Wharton, s. 441.

<sup>2</sup> Compare Westlake (4th ed.), pp. 285, 286; Carver, *Carriage by Sea*, s. 206; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The Gaetano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. 328, 340.

<sup>3</sup> See Carver, s. 210; *Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521; *The Industrie*, [1894] P. (C. A.) 58.

<sup>4</sup> See *The Gaetano* (1882), 7 P. D. (C. A.) 137, 149, 150, per Cotton, L. J.

<sup>5</sup> *Ibid.*, p. 148, judgment of Brett, L. J.

<sup>6</sup> (1865), L. R. 1 Q. B. 115.

“master, under a limited authority, or by the owner himself, the law of the flag determines his liability in point of total amount.”<sup>1</sup> But the reasoning in *Lloyd v. Guibert*, and in subsequent cases,<sup>2</sup> really goes further, and establishes the wider proposition that, to adopt again the language of Mr. Carver, “the character of the obligations which are impliedly undertaken by the shipowner, so far as not varied or excluded by the contract, and with reference to which the contract is made, are also to be determined by the law of the flag. Hence it follows that the effect of the expressed terms in limiting or altering these obligations must be determined by the same law. Also, that the same law must govern the rights of the shipowner against the charterer or shipper, and the obligations of the latter under the contract. For the contract is a whole, and must be read in the light of one and the same consistent set of rules. The exceptions must be read with the obligations, and the obligations on one side with those on the other, for which they are the considerations, and of which they are frequently conditions.”<sup>3</sup>

The proviso, however, contained in our Rule is itself a result of Rule 152.<sup>4</sup> If from any circumstance it can be inferred that the parties to a contract for carriage by sea did not contract with a view to the law of the flag, then the law of the flag is not the proper law of the contract, and the contract is not governed thereby.<sup>5</sup>

#### Illustrations.

1. *A* charters a French ship belonging to *X* and *Y*, French owners, at a Danish West India port, for a voyage from Hayti to Havre, London, or Liverpool, at *A*'s option. The charter-party is entered into by *N*, the master, in pursuance of his general authority as master. *A* ships a cargo at Hayti for Liverpool, with which the ship sails. On her voyage she sustains damage and puts into Fayal, a Portuguese port, for repair. *N* there borrows money from *B* on bottomry of the ship, freight, and cargo, and repairs the ship. She completes her voyage to Liverpool. *B*, the bondholder, proceeds in the English Court of Admiralty against

<sup>1</sup> Carver, s. 206.

<sup>2</sup> See *The Gaetano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. 328.

<sup>3</sup> Carver, s. 206.

<sup>4</sup> See p. 556, ante.

<sup>5</sup> *Chartered Bank of India v. Netherlands Steam Co.* (1883), 10 Q. B. D. (C. A.) 521; *The Industrie*, [1894] P. (C. A.) 58.

the ship, freight, and cargo, which are insufficient to satisfy the bond. The deficiency is paid by *A*. *X* and *Y* give up the ship and cargo to *A*, and are thereby, according to French law, freed from all liability on the contract of *N*, *i.e.*, on the bottomry bond. *A* claims indemnity against *X* and *Y* for money paid to *B*. The rights of *A* and the liabilities of *X* and *Y* are governed by the law of France, *i.e.*, law of the flag.<sup>1</sup>

2. *X*, an Englishman, ships a cargo at New York on board an Italian ship for carriage to London. The ship is at the island of Fayal (Portuguese territory) in distress. *N*, the master, there borrows 2,000*l.* on bottomry of the ship, cargo, and freight, to enable her to proceed on her voyage to London. *N* has the means of communicating with *X*, but does not do so. The bond, under the circumstances, is valid according to Italian law (law of the flag), but would not be valid according to English law. The bond is valid and binds the cargo (*i.e.*, the authority of the master and the validity of the bond is to be determined, as against *X*, by the law of the flag).<sup>2</sup>

3. A German ship, while in a German port, is chartered by English charterers under a charter-party in the English language. The ports of call for orders and delivery of cargo are English. A question arises with reference to delay in delivery of cargo. The contract (*semble*) is governed by English law.<sup>3</sup>

4. *A* is a German shipowner domiciled in Germany. *A*'s ship carrying the German flag and with a German master, is in a French port. *X & Co.* are London merchants. A contract (charter-party) is entered into in London between *A* and *X* for carriage, on board *A*'s ship, of a cargo of rice from India to England. The contract is on an ordinary English printed form, and the terms are the terms of an ordinary English charter-party. It contains special provisions as to the payment of freight on right delivery. On the voyage home, the ship is driven into a port of distress, where part of the cargo is sold. If the contract is governed by the law of the flag (German law), then *A* is entitled to the payment of full freight; if the contract is governed by English law, then *A* is not entitled to the payment of freight for

<sup>1</sup> *Lloyd v. Guibert* (1865), L. R. 1 Q. B. (Ex. Ch.) 115.

<sup>2</sup> *The Gaetano* (1882), 7 P. D. (C. A.) 137; and contrast *The Hamburg* (1864), Br. & L. 253; 33 L. J. P. & M. 116; but note the suggestion of Brett, L. J., 7 P. D. p. 147, that *The Hamburg* may have been rightly decided, because foreign law was not proved in that case.

<sup>3</sup> *The San Roman* (1872), L. R. 3 A. & E. 583.

the cargo sold. The circumstances of the case, and especially the provisions as to payment of freight, show an intention to contract under English law. The law of the flag is excluded, the contract is governed by English law, and *A* is not entitled to full freight.<sup>1</sup>

*Exception.*<sup>2</sup>—The mode of performing particular acts under a contract of affreightment (*e.g.*, the loading or unloading or delivery of goods) may be governed by the law of the country where such acts take place.

SUB-RULE.<sup>3</sup>—The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag.

#### Comment.

The Sub-Rule is an application of Rule 157.<sup>4</sup> But in this instance, as often happens, a special application of a general legal principle is supported by a greater amount of authority than the principle itself; in other words, the cases which establish the rule that a contract of affreightment is generally governed by the law of the flag are, many of them, decisions having reference to the master's authority<sup>5</sup> during the voyage to deal with the cargo. The extent of his authority and the conditions under which it may be exercised differ somewhat under the laws of different countries, but when a conflict arises on this point the law of the flag prevails.<sup>6</sup>

<sup>1</sup> *The Industrie*, [1894] P. (C. A.) 58.

<sup>2</sup> *Lloyd v. Guibert* (1865), L. R. 1 Q. B. (Ex. Ch.) 115, 125, 126. Compare *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 604, judgment of Bowen, L. J.; *Norden Steam Co. v. Dempsey* (1876), 1 C. P. D. 654. See Carver, *Carriage by Sea*, s. 207, and Rule 152, Sub-Rule 3, Second Presumption, p. 563, *ante*.

<sup>3</sup> Carver, s. 211; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. (Ex. Ch.) 115; *The Gaetano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. (C. A.) 328. Compare *The Karnak* (1869), L. R. 2 P. C. 505, and especially pp. 511—513, for language of judgment delivered by Sir W. Erle.

<sup>4</sup> See p. 576, *ante*.

<sup>5</sup> *The Gaetano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. (C. A.) 328.

<sup>6</sup> See Carver, s. 211.

## Illustrations.

1. A German ship, sailing under the German flag, is loading at Singapore for London. She there takes on board a cargo shipped by British subjects under English bills of lading in the usual form. In the course of the voyage the ship is driven into a port of distress, and the master there sells part of the cargo. The master's authority to make the sale is governed, not by the law of England, but by the law of Germany (law of the flag).<sup>1</sup>

2. An Italian ship, sailing under the Italian flag, and with an Italian master, is at Fayal, a Portuguese port, laden with a cargo owned by X & Co., who are domiciled in England, and is bound on a voyage to London. The master borrows money on bottomry of the ship and cargo. The authority of the master to execute a bottomry bond is governed by the law of Italy (law of the flag).<sup>2</sup>

(D) *CONTRACT FOR THROUGH CARRIAGE OF PERSON OR GOODS.*<sup>3</sup>

RULE 158.<sup>4</sup>—The effect of a contract for the carriage of person or goods from a place in one country to a place in another is, as to its general incidents, presumably governed by the law of the place where it is made; but, as to transactions taking place in a particular country, may in certain cases be governed by the law of such country.

## Comment.

There is great uncertainty as to what is the law governing a contract for through carriage of person or goods, which may often be partly by land and partly by water, from a place (*e.g.*, London) in one country to a place (*e.g.*, Paris) in another.<sup>5</sup> Here, as elsewhere, the only ultimate test for determining the law by which a contract is governed is the presumed intention of the parties;<sup>6</sup>

<sup>1</sup> *The August*, [1891] P. (C. A.) 328.

<sup>2</sup> *The Gaetano* (1882), 7 P. D. (C. A.) 137.

<sup>3</sup> See Carver, s. 212.

<sup>4</sup> *Branley v. S. E. Ry. Co.* (1862), 12 C. B. N. S. 63; *Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. N. S. 272; *Cohen v. S. E. Ry. Co.* (1877), 2 Ex. D. (C. A.) 253. But contrast *De Clermont v. Brasch* (1885), 1 Times L. R. 370.

<sup>5</sup> See Carver, s. 212.

<sup>6</sup> See Rule 146, p. 529, *ante*, and Rule 152, p. 556, *ante*.

but, in the kind of contracts with which we are dealing, it constantly happens that no one salient consideration presents itself from which the intention of the parties may be inferred. All that can be strictly laid down is that English Courts, while giving weight to the particular circumstances of each case, still lean, on the whole, to the doctrine that a contract for through carriage is *prima facie* governed by the law of the country where it is made (*lex loci contractus*),<sup>1</sup> and exhibit also a tendency to hold that a contract which can in any way be connected with England is, *prima facie* at any rate, an English contract governed by English law. When, further, as frequently happens in contracts for through carriage, a provision of the contract is valid if governed by the law of one country, but invalid if governed by the law of another country, our Courts are inclined to hold that the contract is governed by the law which gives validity to all its terms.<sup>2</sup>

A suggestion well worth consideration has been made that a "contract for through carriage" may be governed, as to incidents arising in a given country, by the law of the particular country where they take place; thus, if *A* takes in Paris a ticket for the journey from Paris to London, and he is himself injured or his goods are lost in France, his rights may, in respect of the injury or loss, possibly, whatever be the law otherwise governing the contract, depend on the law of France.<sup>3</sup>

### Illustrations.

1. *A* is a passenger travelling, by an English vessel belonging to an English company, from England to the Mauritius *via* Alexandria and Suez. He has taken a ticket in England containing conditions exempting *X & Co.* from liability for loss of luggage. *A*'s luggage is lost on the journey. The condition is valid by English law, but is not valid by the law of Mauritius.

<sup>1</sup> *Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. N. S. 272; and see Rules for determining the proper law of a contract, Sub-Rule 3, First Presumption, p. 563, *ante*.

<sup>2</sup> See, especially, *Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. N. S. 272, 291, 292, judgment of P. C., and compare *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321. Whether this mode of reasoning is legitimate may, it is conceived, be open to doubt.

<sup>3</sup> See *Cohen v. S. E. Ry. Co.* (1877), 2 Ex. D. (C. A.) 253, 262, judgment of Brett, L. J.

The contract is governed by English law (*lex loci contractus*) and the condition is valid.<sup>1</sup>

2. *X & Co.* are a railway company incorporated under English Acts of Parliament for conveyance of passengers and goods from London to Folkestone, and authorised by statute to maintain packets between Folkestone and Boulogne. *A* at Boulogne delivers parcels to *X & Co.* to be carried to London. The contract of carriage contains conditions which may be invalid according to the law of England, but are valid according to the law of France. The contract (*semble*) is governed by the law of France<sup>2</sup> (*lex loci contractus*).

3. *X & Co.*, an English railway company, subject to English statutes as to carriage by rail and authorised to keep steamers for communication between Boulogne and Folkestone, contract with *A*, an Englishman, for the carriage of himself and his luggage from Boulogne to London. *A* takes his ticket at Boulogne. On the ticket there is a condition exempting *X & Co.* from liability for loss of luggage of greater value than 6*l.* *A*'s box, containing articles of greater value than 6*l.*, is lost during transfer from steamboat to train at Folkestone. By French law a carrier cannot protect himself, by conditions, against results of negligence. Whether the contract is governed by English or by French law (?).<sup>3</sup>

4. *A* contracts at a railway station in Paris for the carriage of

<sup>1</sup> *The Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. N. S. 272. Conf. *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321.

<sup>2</sup> See *Branley v. S. E. Ry. Co.* (1862), 12 C. B. N. S. 63, 72, judgment of Erle, C. J. The case is not decisive, since it was doubtful whether the contract was invalid under English law.

<sup>3</sup> *Cohen v. S. E. Ry. Co.* (1877), 2 Ex. D. (C. A.) 253. It was not necessary to decide this point, as the Court held that the condition was not valid either under English or French law. Mellish, L. J., says: "I confess, for my own part, that, the contract being made by an English passenger with an English railway company, regulated by English law, I should have supposed that it ought to be governed by the law of England, and be taken as made with regard to the law of England" (pp. 257, 258). Baggallay, L. J., says: "As to whether [the contract] should be construed according to the law of France or England, I desire not to express any decided opinion, though it appears to me, as at present advised, that there is much to be said in favour of it being construed according to the law of France" (pp. 261, 262). Brett, L. J., holds that "this particular contract is an English contract, to be performed according to the English law" (p. 263), but throws out the suggestion that contracts of the kind may, perhaps, be governed by different laws as to incidents taking place in different countries (p. 262).



himself and luggage from Paris to London. He is to be carried from Paris to Calais by a French railway company, from Calais to Dover by an English steamboat belonging to the S. E. Ry. Co., and from Dover to London by the S. E. Ry. Co. His goods are lost and he is injured at Amiens in consequence of an accident arising from the negligence of the railway company's servants. Whether the contract is, as to the damage done to *A* and his goods, governed by French law or by English law (?).<sup>1</sup>

• • (E) *AVERAGE ADJUSTMENT.*

RULE 159.<sup>2</sup>—As amongst the several owners of property saved by a sacrifice, the liability to general average<sup>3</sup> is governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say),—

- (1) when the voyage is completed in due course, by the law of the port of destination; or,
- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly<sup>4</sup> broken up and the ship and cargo part company.

Comment.

“As amongst the several owners of the property saved by a sacrifice, the liability to general average is determined by the law of the place at which the common adventure terminates, that is to say, the law of the port of destination, when the voyage

<sup>1</sup> See *Cohen v. S. E. Ry. Co.* (1877), 2 Ex. D. (C. A.) 253, 262, 263, judgment of Brett, L. J.

<sup>2</sup> See Lowndes, *Law of Marine Insurance*, s. 339.

<sup>3</sup> “General average is a loss arising from a sacrifice purposely made for the preservation of the ship and all on board from danger—whether the sacrifice consists of throwing overboard cargo, destroying this or that portion of the ship, or adopting measures which involve extraordinary expenditure—which sacrifice, being made on behalf of all, must be replaced by the contribution of all. Thus it appears that general average has properly nothing whatever to do with marine insurance, this contribution being a right which exists independently of it, and, indeed, which existed many centuries before insurance was invented. Its connection with the law of insurance is restricted to a single point, viz., the liability of the insurer to pay back that which his assured has paid as his share.” Lowndes, s. 334.

<sup>4</sup> See *Hill v. Wilson* (1879), 4 C. P. D. 329, 333, judgment of Lindley, J.

“is completed, and, when it is not, the law of the place where the voyage is broken up and the ship and cargo part company.”<sup>1</sup>

Our Rule is in fact an application of the principle, that the proper law of a contract as to the mode of performance is the law of the country where the performance is to take place.<sup>2</sup> The intention of the parties is, that the average adjustment shall be made, *i.e.*, the contract as to this matter be performed, at the place where the voyage rightly terminates. It is, therefore, presumably their intention that the adjustment be governed by the law of such place.

**RULE 160.**<sup>3</sup>—An underwriter is bound by an average adjustment duly taken according to the law of the place of adjustment.

**Comment.**

“The average, if rightly adjusted according to the right place for adjusting it, is as obligatory on the insurer [underwriter] as on the assured who has paid money under it; and it is beside the question to inquire whether the average has been rightly adjusted according to the law of England.”<sup>4</sup>

**RULE 161.**—An English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag.<sup>5</sup>

**Comment.**

The general rule as to the law governing an underwriter's liability has been thus laid down in reference to a particular case :—

“It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part according to the law of

<sup>1</sup> Lowndes, s. 339, citing *Fletcher v. Alexander* (1868), L. R. 3 C. P. 375, and *Fill v. Wilson* (1879), 4 C. P. D. 329. Compare *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481; *Mavro v. Ocean Mar. Ins. Co.* (1875), L. R. 10 C. P. (Ex. Ch.) 414. Both the latter cases refer to liability of underwriters, and in both the policy contains the words “general average as per foreign statement.”

<sup>2</sup> See Rule 152, Sub-Rule 3, Second Presumption, p. 563, *ante*.

<sup>3</sup> See Lowndes, s. 339; *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481; *Mavro v. Ocean Mar. Ins. Co.* (1875), L. R. 10 C. P. (Ex. Ch.) 414. Conf. *Atwood v. Sellar* (1880), 5 Q. B. D. (C. A.) 286.

<sup>4</sup> Lowndes, s. 339. See *De Hart v. Compania Anonima de Seguros “Aurora,”* [1908] 2 K. B. (C. A.) 503.

<sup>5</sup> *Greer v. Poole* (1880), 5 Q. B. D. 272.

“any foreign State, as if it had been made in and by a subject of the foreign State, and the policy in question does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel.”<sup>1</sup>

#### Illustration.

*A*, an English merchant, effects a policy of insurance with *X*, an English underwriter, upon goods shipped in a French ship. The ship puts into port for repairs. The master gives a bottomry bond on ship, freight, and cargo. The ship and freight proving insufficient to satisfy the bond, *A* has to pay the deficiency in order to obtain possession of the goods. This, according to French law, might be a loss by perils of sea, but it is not so according to English law. If it is a loss by perils of sea, *A* has a right to recover the amount paid from *X*. The rights of *A* against *X* must be determined wholly by English law. *A* has no right to recover from *X* the amount paid to release the goods.<sup>1</sup>

#### (F) *PROVISIONS OF BILLS OF EXCHANGE ACT, 1882, AS TO CONFLICT OF LAWS.*<sup>2</sup>

##### *Bill of Exchange.*

#### [RULE 162.—Bills of Exchange Act, 1882, s. 2 (part)]

<sup>1</sup> *Greer v. Poole* (1880), 5 Q. B. D. 272, per Lush, J.

<sup>2</sup> Rules 162 to 166 consist of sections of the Bills of Exchange Act, 1882, which have reference, directly or indirectly, to the conflict of laws. At the cost of some awkwardness of expression, the language of the Act is followed verbatim, except where words or figures are added. Every addition is printed within square brackets.

From the fact that Rules 162 to 166 are citations from an Act of Parliament, the law is not here, as throughout the rest of this Digest, stated in the form of Rules and Exceptions. Had this form been adhered to, the language of the Act must have been slightly varied, the sub-sections would have appeared as separate Rules, and the provisos thereto as, what they really are, exceptions to a Rule. In reference to Rules 162 to 166, the word “sub-section” is used instead of “clause” in order to emphasise the fact that each of these Rules is a statutory enactment. The illustrative comment is placed, not at the end of each Rule, but after that part of each enactment, *e.g.*, sub-section, which the comment most naturally follows.

The reader is especially referred to Chalmers' *Digest of the Law of Bills of Exchange* (6th ed.), 1903: it is an elaborate and almost authoritative exposition of the law embodied in the Bills of Exchange Act, 1882. I have, with Sir M. D. Chalmers' permission, made use of his commentary and illustrations, and in fact have, wherever it was possible, followed his treatise. For valuable criticism on the Act, see Westlake (4th ed.), pp. 290—298.

and s. 4.] In this Act, unless the context otherwise requires:—

[1] “Acceptance” means an acceptance completed by delivery or notification.<sup>1</sup>

[2] “Bearer” means the person in possession of a bill or note which is payable to bearer.

[3] “Bill” means bill of exchange, and “note” means promissory note.

[4] “Delivery” means transfer of possession, actual or constructive, from one person to another.<sup>2</sup>

[5] “Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.<sup>3</sup>

[6] “Indorsement” means an indorsement completed by delivery.<sup>4</sup>

[7] “Issue” means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.<sup>5</sup>

[8] “Person” includes a body of persons, whether incorporated or not.

[9] “Value” means valuable consideration.<sup>6</sup>

<sup>1</sup> See Bills of Exchange Act, 1882, s. 2, and compare s. 21; Chalmers (6th ed.), pp. 3, 53; *Smith v. McClure* (1804), 5 East, 476.

<sup>2</sup> Chalmers, pp. 4, 53.

<sup>3</sup> Conf. Bills of Exchange Act, 1882, s. 38, as to “rights of holder;” s. 29, “as to holder in due course;” and s. 31, as to “negotiation.” See Chalmers, pp. 5, 123; 90, 104.

<sup>4</sup> See Chalmers, p. 6, and compare s. 21, Chalmers, p. 53.

<sup>5</sup> Chalmers, p. 6. “For stamp purposes, a bill is not to be deemed to be issued until it has reached the hands of a holder for value.” Chalmers, pp. 7 and 217.

<sup>6</sup> For definition of “valuable consideration,” see further, Bills of Exchange Act, 1882, s. 27:

“(1) Valuable consideration for a bill may be constituted by—

“(a) Any consideration sufficient to support a simple contract;

“(b) An antecedent debt or liability. Such a debt or liability is  
“deemed valuable consideration, whether the bill is payable  
“on demand or at a future time.

“(2) Where value has at any time been given for a bill, the holder is deemed  
“to be a holder for value as regards the acceptor and all parties to  
“the bill who became parties prior to such time.

“(3) Where the holder of a bill has a lien on it arising either from contract or  
“by implication of law, he is deemed to be a holder for value to the  
“extent of the sum for which he has a lien.”

[10] “Written” includes printed, and “writing” includes print.

[11] (1) An inland bill is a bill which is or on the face of it purports to be

(a) both drawn and payable within the British Islands, or

(b) drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

For the purposes of this Act, “British Islands” mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill.<sup>1</sup>

#### Comment.

*As to Rules taken from the Bills of Exchange Act, 1882.*—Any conflict of laws with regard to bills of exchange is now determined by the Bills of Exchange Act, 1882, in so far as that statute applies. The Act, however, is not exhaustive,<sup>2</sup> and the sections relating to the conflict of laws do not settle all the questions of private international law in regard to a bill which might be raised in an English Court. These sections follow in the main the principles laid down in the preceding Rules of this Digest. The Bills of Exchange Act reproduces, for the most part, the effect of decided cases which themselves are in conformity with the principles of private international law adopted by English Courts, and which, though decided before the passing of the Act, may still with advantage be consulted.<sup>3</sup>

<sup>1</sup> See Chalmers, p. 16.

<sup>2</sup> *Ex parte Roberts* (1886), 18 Q. B. D. (C. A.) 286.

<sup>3</sup> See *Burrows v. Jemino* (1726), 2 Strange, 733; *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Kearney v. King* (1819), 2 B. & Ald. 301; *Wynne v. Jackson* (1826), 2 Russ. 451; *Don v. Lippmann* (1837), 5 Cl. & F. 1; *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385; *Trumbey v. Fignier* (1834), 1 Bing. N. C. 151; *Cooper v. Waldegrave* (1840), 2 Beav. 282; *Rothschild v. Currie* (1841), 1 Q. B. 43; *Allen v.*

The passing of the Bills of Exchange Act gives, it is submitted, no reason for altering the opinion published some years ago by the present writer,<sup>1</sup> that the rules determining the rights and liabilities of the different parties to a bill are, as regards the conflict of laws, with rare exceptions, the applications of two principles—first, that the formal validity of a contract is determined by the law of the country where the contract is made;<sup>2</sup> and secondly, that the interpretation of a contract and the rights and obligations arising under it are determined in accordance with the law to which the parties may be presumed to have intended to submit themselves, *i.e.*, the proper law of the contract.<sup>3</sup>

[RULE 163.<sup>4</sup>—Bills of Exchange Act, 1882, s. 72.]  
Where a bill drawn in one country is negotiated,<sup>5</sup> accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of

*Kemble* (1848), 6 Moore, P. C. 314; *Ralli v. Dennistoun* (1851), 6 Ex. 483; *Gibbs v. Fremont* (1853), 9 Ex. 25; *Sharples v. Rickard* (1857), 2 H. & N. 57; *Suse v. Pompe* (1860), 8 C. B. N. S. 538; *Scott v. Pilkington* (1862), 2 B. & S. 11; *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Brudlaugh v. De Rin* (1868), L. R. 3 C. P. 538; (1870) L. R. 5 C. P. (Ex. Ch.) 473; *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; *Goodwin v. Robarts* (1876), 1 App. Cas. 476; *Willans v. Ayers* (1877), 3 App. Cas. 133; *Horne v. Rouquette* (1878), 3 Q. B. D. (C. A.) 514; *In re Marseilles, &c. Co.* (1885), 30 Ch. D. 598; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

<sup>1</sup> See "Conflict of Laws and Bills of Exchange," *American Law Review*, July, 1882.

<sup>2</sup> See Rule 150, p. 540, *ante*.

<sup>3</sup> See Rule 152, p. 556, *ante*.

<sup>4</sup> Chalmers (6th ed.), pp. 241—247.

<sup>5</sup> "(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

"(2) A bill payable to bearer is negotiated by delivery.

"(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

"(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee, in addition, acquires the right to have the indorsement of the transferor.

"(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability."  
(Bills of Exchange Act, 1882, s. 31.)

issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

#### Comment.

*Bill of exchange and conflict of laws.*—A bill of exchange is an instrument embodying, not one contract, but a series of different, though interconnected contracts; or may, perhaps, be more accurately described as a congeries of contracts hanging on to one original contract, which always has a certain effect on the others. The instrument no doubt has, as a whole, certain peculiarities. It exists for one object, namely, to secure to the holder the payment in due course of the sum for which the bill is drawn; but the several contracts entered into for this purpose by the drawer, the acceptor, and the indorser respectively, and therefore the several rights and liabilities of each of these parties, are distinct and different. This is a matter which ought not to be overlooked, for many difficulties which have perplexed judges and text-writers, when called upon to deal with the conflict of laws in reference to the rights or obligations of the parties to a bill, have arisen from the habit of regarding a bill as a single contract, instead of re-

garding it as what it really is,—an instrument containing several distinct contracts. These several contracts have one feature in common: they are each perfected by delivery.<sup>1</sup> This matter becomes of consequence when we are called upon to determine what is the place at which the contract of a party to a bill, say the acceptor or the indorser, is made or completed.

A bill is clearly an instrument which from its nature is likely to give rise to a conflict of laws. It may be drawn in one country, *e.g.*, France; be accepted in another, *e.g.*, England; be indorsed in a third, *e.g.*, Belgium; and be payable in a fourth, *e.g.*, Germany. The law of each of these countries may, conceivably at any rate, affect the validity of the bill, or the rights or obligations of the parties to it. It may be necessary to determine, as in the case of other contracts, whether the bill, or a contract embodied in the bill, is valid as regards its *form*, and what therefore is the law determining its formal validity. It may be further necessary to determine what are the rights or obligations of each of the parties to a bill, and therefore to determine what is the law governing the *interpretation* and *obligation* of each contract.

*Form.*—Sub-section 1 deals with the *formal validity* of a bill and of each contract contained in it.

The principle laid down in this sub-section, independently of the provisos by which the effect of the sub-section is modified, exactly corresponds with Rule 150.<sup>2</sup> The formal validity of a bill and of the several contracts contained therein depends on the law of the country where each contract is made or completed. Hence the validity of the bill itself is governed by the law of the place of issue, *i.e.*, by the law of the place where the bill, being complete in form, is first delivered to a person who takes it as holder; the formal validity of the acceptance is determined by the law of the place where the acceptor's contract is complete.

The provisos are in reality exceptions to the principles enunciated in sub-section 1.

*As to proviso (a).* Independently of the Bills of Exchange Act, 1882, it would seem that where a bill issued abroad is, on account of its not being stamped in accordance with the law of the place of issue, *absolutely void* and not merely inadmissible in

<sup>1</sup> See Bills of Exchange Act, 1882, s. 21; and Chalmers (6th ed.), p. 53 and notes.

<sup>2</sup> See p. 540, *ante*.



evidence at the place of issue, it would be void in England.<sup>1</sup> Under the Act, however, such a bill is now clearly not invalid in the United Kingdom for want of the stamp with which it ought to have been stamped in the country, *e.g.*, France, where it was issued.

This proviso, however, applies only to invalidity arising from the want of the stamp. It has no reference to any other cause of invalidity.

*As to proviso (b).* This second proviso, again, is a partial deviation from the principle that the formal validity of a contract depends on the law of the place where it is made. Under it a bill, which for defect of form is void in the country where it is issued, may be valid in the United Kingdom; and so, again, it would seem, an indorsement or acceptance invalid in respect of form, by the law of the country where it takes place, might be valid in the United Kingdom.

The validity, however, of a bill under this proviso is subject to three limitations:—

*First.* It must conform, as regards requisites in form, to the law of the United Kingdom.

*Secondly.* It can be treated as valid only for the purpose of enforcing payment.

*Thirdly.* The bill is to be treated as valid only between persons who negotiate, hold, or become parties to it in the United Kingdom.

### Illustrations.

#### *Sub-section 1.*

1. By German law a bill need not express the value received. By French law it must. A bill drawn in Germany, but payable in Paris, which does not express the value received, is valid.

2. By the law of Illinois a verbal acceptance is valid. A bill drawn in London on a town in Illinois is verbally accepted there. The acceptance is valid.<sup>2</sup>

#### *Proviso (a).*

3. A bill is issued in a foreign country. It is not stamped, as required by the law of such country, and is therefore void there. It is not on this account invalid in England.

<sup>1</sup> See *Olegg v. Levy* (1812), 3 Camp. 166; *Bristow v. Sequeville* (1850), 5 Ex. 275; Chalmers (6th ed.), p. 242.

<sup>2</sup> See Chalmers, p. 242.

*Proviso (b).*

4. A bill is drawn in France by a domiciled Frenchman in the French language, in an English form (and indorsed in blank), on an English company, by whom the bill is accepted payable in London. As regards the acceptor the bill is an English bill, and is to be treated as valid. The effect under French law of an indorsement in blank is immaterial.<sup>1</sup>

5. A bill drawn and payable in France expresses no value received, and is therefore invalid according to French law. It is indorsed in England. The indorser could be sued *hérè*<sup>2</sup> under proviso (b), though the drawer could not.

(2) Subject to the provisions of this Act,<sup>3</sup> the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill is determined by the law of the place where such contract is made.<sup>4</sup>

Provided that where an inland bill is indorsed in a foreign country [*i.e.*, a country not forming part of the British Islands<sup>5</sup>], the indorsement shall as regards the payer, be interpreted according to the law of the United Kingdom.<sup>6</sup>

<sup>1</sup> See *Smallpage's & Brandon's Cases* (1885), 30 Ch. D. 598. The case refers to bills made before the passing of the Bills of Exchange Act, 1882, but, at any rate, if the acceptance took place in London, is an illustration of proviso (b). See Chalmers, p. 242, note 1.

<sup>2</sup> Cf. *Wynne v. Jackson* (1826), 2 Russ. 351, 634. See Chalmers, p. 242.

<sup>3</sup> The provisions referred to are the remaining sub-sections of the Bills of Exchange Act, 1882, s. 72, or, in other words, the other sub-sections or clauses of Rule 160, and also possibly the Bills of Exchange Act, 1882, ss. 15, 53 (see Chalmers, p. 243, note 2), which do not, however, appear to have any very direct bearing on the conflict of laws. Thus sect. 53 refers to a difference between the law of England and the law of Scotland in respect of the effect of a bill as an assignment of a fund in the hands of a drawee.

<sup>4</sup> *Allen v. Kemble* (1848), 6 Moore, P. C. 314; *Horne v. Rouquette* (1878), 3 Q. B. D. (C. A.) 514, 520, judgment of Brett, L. J.

<sup>5</sup> Compare definition of "British Islands," p. 587, *ante*, taken from the Bills of Exchange Act, 1882, s. 4. Note that "British Islands" includes more than the United Kingdom. Note also that "foreign" is here used in a sense different from, and less extensive than, the sense given it in the other Rules in this Digest. See pp. 67, 71, *ante*.

<sup>6</sup> *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77.

## Comment.

On this sub-section the remarks of Mr. Chalmers merit particular attention.

"The term 'interpretation,'" he writes, "in this sub-section, it is submitted, clearly includes the obligations of the parties as deduced from such interpretation.<sup>1</sup>

"Story,<sup>2</sup> s. 154, points out the reasons of the rule adopted in this sub-section. 'It has sometimes been suggested,' he says, 'that this doctrine is a departure from the rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity with that rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree upon due notice to reimburse the holder in principal and damages when they respectively entered into the contract.'

"The case of a bill accepted in one country but payable in another gives rise to a difficulty. Suppose a bill is accepted in France, payable in England. Perhaps the maxim, *Contrariusse unusquisque in eo loco intelligitur in quo ut solveret se obligavit*, would apply. But if not, then comes the question, what is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the *lex loci solutionis* would be regarded: cf. *Nouguier*, s. 1419."<sup>3</sup>

It is therefore doubtful whether, when a bill is accepted in one country, *e.g.*, England, and made payable in another, *e.g.*, France, the obligations of the acceptor are governed, as the words of the section strictly taken imply, by the law of the country where the bill is accepted (*lex loci contractus*), or, as they ought to be on principle,<sup>4</sup> by the law of the country where the bill is made payable (*lex loci solutionis*).

The probable explanation of this difficulty is curious. Story's expressions<sup>5</sup> have apparently suggested the terms of sub-section 2. Story's language may be read, and probably was read by the persons engaged in considering the bill, as meaning that the obli-

<sup>1</sup> Compare Westlake (4th ed.), p. 293.

<sup>2</sup> Story, Commentary on the Law of Bills of Exchange.

<sup>3</sup> Chalmers (6th ed.), p. 244.

<sup>4</sup> Compare *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525.

<sup>5</sup> Compare Story, Commentary on the Law of Bills of Exchange, ss. 153, 154.

gations of the parties to a bill are governed by the law of the place where each party contracts. But this is not his real meaning; he clearly intends to lay down, though in a very roundabout way, that each contract embodied in a bill is to be interpreted by the law of the country where it is to be performed (*lex loci solutionis*). Unfortunately the language of sub-sect. (2) reproduces the words rather than the meaning of Story. The result is, that if the terms of the sub-section be strictly interpreted, the obligations of an acceptor are to be governed, not, as Story intended, by the *lex loci solutionis*, but by the *lex loci contractus*. Mr. Chalmers' suggestion to a certain extent meets the objections to this result, but it may be doubted whether his suggestion is not in conformity rather with the doctrine of Story, when properly understood, than with the language of the Bills of Exchange Act, 1882, s. 72, sub-s. (2).

#### Illustrations.

1. An English note payable to bearer is negotiated by delivery in a country where this mode of transfer is not recognised. The title to the note passes by such delivery.<sup>1</sup>

2. Action in England on a bill drawn in Belgium and indorsed in blank in France. The effect of such indorsement is determined according to French law, *i.e.*, it operates as a "procuration."<sup>2</sup>

3. A general acceptance given in Paris is to be interpreted according to French law.<sup>3</sup>

4. A bill drawn in Belgium on England is indorsed in France in blank. The indorsement is (perhaps) to be interpreted according to French law as regards the indorser.<sup>4</sup>

5. A bill payable to order, drawn, accepted, and payable in England, is indorsed in France. The indorsement by the law of France gives no right to the indorsee to sue in his own name. The indorser (who is also drawer and payee) and the indorsee are, at the time the bill is made, subjects of and domiciled and

<sup>1</sup> *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385; Chalmers (6th ed.), p. 243.

<sup>2</sup> *Trimby v. Vignier* (1834), 1 Bing. N. C. 151. Conf. Nougier, ss. 747—760; *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538, per Willes, J. See Chalmers, p. 243, note 6.

<sup>3</sup> Conf. *Don v. Lippmann* (1837), 5 Cl. & F. 1, 12, 13. And see *Wilde v. Sheridan* (1852), 21 L. J. Q. B. 260.

<sup>4</sup> *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538. Compare Chalmers, p. 243.

resident in France. The indorsee can nevertheless maintain an action in England on the bill against the acceptor.<sup>1</sup>

6. A bill drawn by *A*, an Englishman domiciled in England, on *X*, a Frenchman domiciled in France, is made payable in France, but is accepted by *X* in England. Whether *X*'s liabilities under the bill are governed by the law of England or by the law of France?<sup>2</sup>

- (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.<sup>3</sup>

#### Comment.

The language of this sub-section is obscure. It should probably be construed *reddendo singula singulis*. The words "act is done" refer to presentment for acceptance or payment; the words "bill is dishonoured" refer to protest and notice of dishonour. As pointed out by Westlake,<sup>4</sup> the word "act" presumably includes omission.

#### Illustrations.

1. *X* indorses to *A* in England a bill payable in Paris. *A* indorses it to a Frenchman, who on dishonour protests it, and transmits notice of protest to *X*, in accordance with French law. *A* can recover from *X* though he has not given him notice of dishonour according to English law.<sup>5</sup>

2. A bill is drawn in England payable in Spain. It is indorsed in England by *X* to *A*. *A* indorses it to *M*. It is dishonoured by non-acceptance, and twelve days afterwards *M* gives notice of this

<sup>1</sup> *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77. This would appear to follow from the Bills of Exchange Act, 1882, s. 72, sub-s. (2), proviso. But the case, decided before the passing of the Act, depends on the principle that the contract of an acceptor who accepts in England is to pay an order valid by the law of England.

<sup>2</sup> See pp. 593, 594, *ante*.

<sup>3</sup> Compare Chalmers, p. 246, and Westlake (4th ed.), pp. 294, 295.

<sup>4</sup> Westlake, p. 295.

<sup>5</sup> *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340.

to *A*. *A* at once gives notice to *X*. By Spanish law, no notice of dishonour by non-acceptance is required. *A* can recover from *X*.<sup>1</sup>

- (4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts<sup>2</sup> at the place of payment on the day the bill is payable.<sup>3</sup>

#### Illustration.

A bill for 1,000 francs, payable three months after date, is drawn in France on London. The amount in English money the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable.<sup>4</sup>

- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.<sup>5</sup>

#### Illustrations.

1. By English law, days of grace are allowed on bills payable after date. By French law, they are not. A bill drawn in Paris on London is entitled to three days of grace, whilst a bill drawn in London on Paris is not entitled to any days of grace.<sup>6</sup>

2. A bill is drawn in England payable in Paris three months after date. After it is drawn, but before it is due, a "moratory" law is passed in France, in consequence of war, postponing the

<sup>1</sup> *Horne v. Rouquette* (1878), 3 Q. B. D. (C. A.), 514; Chalmers, p. 246.

<sup>2</sup> See Bills of Exchange Act, 1882, s. 10, and Chalmers, p. 30.

<sup>3</sup> Bills of Exchange Act, 1882, s. 72, sub-s. (4); Chalmers, p. 246.

<sup>4</sup> Chalmers, p. 247.

<sup>5</sup> Bills of Exchange Act, 1882, s. 72, sub-s. (5); Chalmers, p. 247.

<sup>6</sup> Chalmers, p. 247.

maturity of all current bills for one month. The maturity of this bill is for all purposes to be determined by French law.<sup>1</sup>

[RULE 164.—Bills of Exchange Act, 1882, s. 57.]  
Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser,—
  - (a) The amount of the bill :
  - (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
  - (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.<sup>2</sup>
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where

<sup>1</sup> See Chalmers, p. 247; *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525. See also *Burrows v. Jemino* (1726), 2 Str. 733.

<sup>2</sup> *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Suse v. Pompe* (1860), 8 C. B. (N. S.) 538; *Willans v. Ayers* (1877), 3 App. Cas. 133, 146.

a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.<sup>1</sup>

### Comment.

The word "abroad" is not defined in the Bills of Exchange Act, 1882. It probably here means outside the British Islands, as the "British Islands"<sup>2</sup> are defined in s. 4 of the Act. . .

The following points should be noted :—

*First.* When a bill, wherever drawn, is dishonoured within the British Islands, the measure of damages recoverable is to be determined in accordance with sub-s. (1), and this sub-section refers exclusively to bills dishonoured at home.<sup>3</sup> When a bill, wherever drawn, is dishonoured abroad, *i.e.*, outside the British Islands, then the amount recoverable is the amount of the re-exchange, with interest thereon until the time of payment.

*Secondly.* "Re-exchange" in its usual application, means the "loss resulting from the dishonour of a bill in a country different to that in which it was drawn or indorsed. The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour at the *then rate of exchange* on the place where the drawer or indorser sought to be discharged resides) must be drawn in order to realize at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour. The expenses consequent on dishonour are the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn, the price of the stamp."<sup>4</sup>

*Thirdly.* Sect. 57 (reproduced in Rule 164) determines most of the questions which can arise as to the damages recoverable on a dishonoured bill. The cases, therefore, decided before the Act came into force are for the most part useless. The principle which

<sup>1</sup> Chalmers, pp. 193—197. See, as to how far damages are recoverable on a writ specially indorsed, *London, &c. Bank v. Earl of Clancarty*, [1892] 1 Q. B. 689; *Dando v. Boden*, [1893] 1 Q. B. 318.

<sup>2</sup> For term "British Islands," see Rule 162, p. 587, *ante*.

<sup>3</sup> *Ex parte Roberts* (1886), 18 Q. B. D. (C. A.) 286, 292, per Curiam; *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522, 527; and see *In re English Bank of the River Plate*, [1893] 2 Ch. 438.

<sup>4</sup> Chalmers, p. 196. See, further, the whole passage in Chalmers, of which this is a part.



they on the whole suggest is, that "the place at which each party "to a bill or note undertakes that *he himself* will pay it [*lex loci solutionis*] determines with regard to him the *lex loci contractus* "according to which his liability is governed;"<sup>1</sup> or, in other words, that the damages due from the party to a bill are determined by the proper law of his contract.<sup>2</sup> This rule is in conformity with the general principles as to the law governing liability under a contract,<sup>2</sup> but cannot (it is submitted) be always acted upon in cases coming within s. 57. Thus, if *Y* draws a bill in France made payable and accepted by *X* in England, and indorses it to *A* in France, and the bill is dishonoured by *X* in England, the damages recoverable in an action in England by *A* against *Y* are to be determined by sub-s. (1), without any respect to the damages which may be recoverable against *Y* under the law of France.

Note, however, that the provisions of s. 57 are not exhaustive. Hence a foreign drawer of a bill accepted and dishonoured in England, who has paid re-exchange, may recover it from the English acceptor, and if he is liable for the re-exchange he may prove for it in bankruptcy against the acceptor's estate before the actual payment.<sup>3</sup>

#### Illustration.

*X* draws in England a bill on *M* at Vienna, payable there, for £750. *X* indorses the bill in England to *A*. *M* accepts the bill, but it is dishonoured. *A* is entitled to recover from *X* the re-exchange, *i.e.*, the value of the foreign coin expressed in English money at the rate of exchange, with interest and expenses.<sup>4</sup>

#### Promissory Note.

[RULE 165.—Bills of Exchange Act, 1882, s. 83 (1).]  
A promissory note is an unconditional promise in writing

<sup>1</sup> Mayne, *Damages* (4th ed.), p. 234, cited Chalmers, p. 244.

<sup>2</sup> For the meaning of the term "proper law," see Rule 146, p. 529, *ante*.

<sup>3</sup> *Ex parte Roberts* (1886), 18 Q. B. D. (C. A.) 286.

The Bills of Exchange Act, 1882, does not deal with the law determining the validity and effect of a discharge from liability under a bill of exchange. This is regulated by the law in reference to discharge of contracts generally. See Rule 153, p. 569, *ante*, under which the validity and effect of a discharge depends, speaking generally, on the proper law of the contract. Compare, however, Chalmers, p. 245.

<sup>4</sup> *Suse v. Pompe* (1860), 8 C. B. (N. S.) 538; 30 L. J. C. P. 75; *Manners v. Pearson*, [1898] 1 Ch. (C. A.) 581.

made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.<sup>1</sup>

#### Illustrations.

1. An I. O. U. containing a promise to pay may constitute a note.<sup>2</sup>

The following are invalid as notes:—

2. "Borrowed of C 100*l.* to account for on behalf of the X Club at — months' notice if required." (Signed) T. B.<sup>3</sup>

3. "I. O. U. 20*l.* for value received." (Signed) W. B.<sup>4</sup>

4. "Nine years after date I promise to pay C 100*l.*, provided X shall not return to England, or his death be certified in the mean time." (Signed) W. B.<sup>5</sup>

[RULE 166.—Bills of Exchange Act, 1882, s. 89.]

(1) Subject to the provisions in this part [*i.e.*, Part IV.<sup>6</sup> of the Bills of Exchange Act, 1882], and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

<sup>1</sup> Chalmers, p. 265.

This is the definition of a British note for other than stamp purposes, but it is not the definition of a foreign note. A foreign note must conform to foreign law in form—*i.e.*, to the law of the country where the note is made.

<sup>2</sup> *Brooks v. Elkins* (1836), 2 M. & W. 74.

<sup>3</sup> *White v. North* (1849), 3 Ex. 689.

<sup>4</sup> *Gould v. Coombs* (1845), 1 C. B. 543.

<sup>5</sup> *Morgan v. Jones* (1830), 1 C. & J. 162. See Chalmers, p. 265.

<sup>6</sup> Part IV. of the Bills of Exchange Act, 1882, ss. 83—89, refers to 'promissory notes.

- (3) The following provisions as to bills do not apply to notes; namely, provisions relating to—
- (a) Presentment for acceptance;
  - (b) Acceptance;
  - (c) Acceptance *suprà* protest;
  - (d) Bills in a set.
- (4) Where a foreign note is dishonoured, protest thereof is unnecessary.

#### Comment.

The effect of this Rule, which reproduces the Bills of Exchange Act, 1882, s. 89, is that Rules 162 to 164,<sup>1</sup> reproducing parts of the Bills of Exchange Act, 1882, are applicable to promissory notes no less than to bills, subject to the general provisions of the Bills of Exchange Act, 1882, and the particular provisions of this Rule.

#### (G) *NEGOTIABLE INSTRUMENTS GENERALLY.*

RULE 167.<sup>2</sup>—Any instrument for securing the payment of money, *e.g.*, a bill of exchange or a government bond, whether foreign or English, may be made a negotiable instrument either—

- (1) by custom of the mercantile world in England, which custom may, if well established, be of recent origin; or
- (2) by Act of Parliament.

A “negotiable instrument” means an instrument for securing the payment of money which has the following characteristics:—

- (a) The property in the instrument and all the rights

<sup>1</sup> See pp. 585—598, *ante*.

<sup>2</sup> Compare *Rumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194; *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; and see judgment in Court below (1888), 38 Ch. D. 388; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144; *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515. Note that *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, must be considered as overruled by *Goodwin v. Roberts* (1876), 1 App. Cas. 476.

under it pass to a *bonâ fide* holder for value by mere delivery to him.

(b) In the hands of such holder the property in and the rights under such instrument are not affected by defects in the title of or defences available against the claims of any prior transferor or holder.

RULE 168.<sup>1</sup>—No instrument, whether English or foreign, is a negotiable instrument in England unless it is made so either by custom of the mercantile world in England, or by Act of Parliament.

#### Comment.

The nature<sup>2</sup> and characteristics of a negotiable instrument have been thus broadly summarised: "A negotiable instrument payable "to bearer is one which, by the custom of trade [or under statute] "passes from hand to hand by delivery, and the holder of which "for the time being, if he is a *bonâ fide* holder for value without "notice, has a good title, notwithstanding any defect of title in "the person from whom he took it."<sup>3</sup>

From the judicial statement, combined with the language of Rules 167 & 168, a student may collect the general features marking any instrument (*e.g.*, a promissory note or bill of exchange) which in England is "negotiable" in the strict sense of that term. First, the property in the instrument (*e.g.*, the promissory note), and all rights under it pass by mere *delivery* to the person (called the holder) to whom the note is delivered.<sup>4</sup> Secondly, the holder for value<sup>5</sup> who receives the note *bonâ fide* (that is, without notice or knowledge of any defect in the title of the person who transfers it

<sup>1</sup> See note 2 to Rule 167, p. 601, *ante*.

<sup>2</sup> For a detailed account thereof, see, *e.g.*, Pollock, *Principles of Contract* (7th ed.), pp. 217—228.

<sup>3</sup> *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. (C. A.) 270, 294, per Curiam. The decision in this case is reversed (*London Joint Stock Bank v. Simmons*, [1892] A. C. 201), but the reversal does not affect the passage cited.

<sup>4</sup> See *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515.

<sup>5</sup> The value need not be paid by the holder himself. It is sufficient if value has been given for the note by some person who has held it before the last holder. *X*, the maker of a promissory note, gives it as a present to *A*. *A* receives value for it from *B*. *B* gives the note as a present to *C*, who pays nothing for it. *C* is a *bonâ fide* holder for value.

to him), has a perfectly *good title* to the note, however defective may be the title of the transferor, who may, for example, have actually stolen the note and have no property in it at all, or in the title of those from whom the transferor has obtained the note. And the *bonâ fide* holder further, just because he obtains a good title to the note and all rights under it, is, when he demands payment thereof, not exposed to having his claim met by defences available against the transferor, *e.g.*, that though the transferor has a right to be paid the amount due on the note, say 100%, by the maker of the note, the transferor himself owes 100% to the maker which the maker of the note could, in an action by the transferor, set off against the transferor's claim. Thirdly, the note may be transferred by one *bonâ fide* holder for value to another, who immediately on receiving it acquires himself a full title to the property in the note and to all rights under it.<sup>1</sup>

The thing which it is really essential to remember is that a strictly "negotiable" instrument, *e.g.*, a promissory note or a bank note, is, as far as the nature of things admits, transferable, like cash, by delivery. No doubt its actual value depends upon the degree of certainty one can entertain that the person who binds himself by a negotiable instrument to the payment, *e.g.*, of 100%, will be able and ready to pay it. When, as in the case of a note issued by the Bank of England, the payment of money in exchange for it is practically certain, a negotiable instrument does possess not only the characteristics but the value of money.

Add further that under the law of England instruments of the most different kinds (*e.g.*, bills of exchange, promissory notes, Bank of England notes, or bonds issued by foreign governments or by English and foreign companies) may, provided only that the rights given thereby can pass by delivery, be negotiable instruments.

<sup>1</sup> It is sometimes alleged to be an additional feature of negotiability that a negotiable instrument is one which can always be put in suit by the party holding it. See *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, 381, 382, judgment of Blackburn, J. But this statement, in so far as it is true, is simply part of the fact that a *bonâ fide* holder, to whom, *e.g.*, a promissory note has been delivered, acquires thereby all the rights under the note of the prior holder, from whom he has taken it. And the statement itself, as has been pointed out, is not in all cases quite accurate. A foreign sovereign may issue bonds, which are by custom negotiable in England, and may promise under them to repay 100% borrowed on each of them; yet no foreign sovereign can be sued in England for the failure to pay the money due under such bond. For this criticism, see Chalmers (6th ed.), p. 316.

Our main business, however, in this work is to note in regard to negotiable instruments several points which specially concern or touch upon the conflict of laws.

(1) Instruments which are "negotiable" in England owe their negotiability either to Act of Parliament (as is now the case with bills of exchange in virtue of the Bills of Exchange Act, 1882) or to English mercantile custom (as is the case with negotiable instruments, *e.g.*, bonds issued by foreign governments or by English or foreign companies).<sup>1</sup>

(2) The custom which in England makes an instrument negotiable has two peculiarities: It must, in the first place, be the custom of the English mercantile world; it may, in the second place, provided its existence be well established, have grown up within a very few years.

"It is no doubt true that negotiability can only be attached to a contract by the law merchant or by a statute; and it is also true that, in determining whether a usage has become so well established as to be binding on the Courts of law, the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities" [debenture bonds issued by an English company in England and by foreign companies abroad, and expressed to be payable to bearer, and not being promissory notes] "in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant"

<sup>1</sup> *Pickel v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515.

Mercantile custom is apparently the creator, as a matter of history, of all instruments recognised as negotiable in England. Many of them are now negotiable under Act of Parliament, but they were treated as negotiable by the English mercantile world, and their negotiability was recognised by the Courts long before it was enacted by statute. Parliament, it is conceived, has rarely, if ever, conferred negotiability on any instrument which has not been treated as negotiable by English mercantile custom.

[created as it really is by custom] "is not fixed and stereotyped; "it has not yet been arrested in its growth by being moulded into "a code; it is, to use the words of Cockburn, C. J., in *Goodwin v. Roberts*,<sup>1</sup> capable of being expanded and enlarged so as to meet "the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and "adopts from time to time those usages of merchants which are "found necessary for the convenience of trade. . . . Thus it has "been found convenient to treat securities like those in question in "this action as negotiable, and the Courts of law, recognising the "wisdom of this usage, have incorporated it in what is called the "law merchant, and have made it part of the common law of the "country. In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved "and its consequence is so obvious that it must be taken now to "be part of the law; the very expression 'bearer bond' connotes "the idea of negotiability, so that the moment such bonds are "issued to the public they rank themselves among the class of "negotiable securities." <sup>2</sup>

(3) No instrument is in England a negotiable instrument which is not made so either by Act of Parliament, or by the custom of the English mercantile world.

Hence no instrument can be made strictly negotiable by mere agreement between the parties to it that it shall have the character of negotiability; "mere private agreement or *particular* custom cannot be admitted as part of the law merchant so as to introduce new kinds of negotiable instruments."<sup>3</sup> Hence, too, instruments which are negotiable in a foreign country (*e.g.*, bonds issued by a foreign Government) are not on that account negotiable in England unless they have become negotiable by the custom of the English mercantile world.

In most of the reported cases involving the question, whether given instruments were negotiable, the point at issue has been whether a *bond fide* holder who has given value for an instrument, *e.g.*, a bond, which has been stolen or obtained fraudulently from

<sup>1</sup> L. R. 10 Ex., at p. 346.

<sup>2</sup> *Edelstein v. Schuler & Co.*, [1902] 2 Q. B. 144, 154, 155, judgment of Bigham, J.; and see *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658.

<sup>3</sup> See Pollock, *Principles of Contract* (7th ed.), p. 231.

its owner, has a right to retain it against such owner, and the answer to this question has depended upon the reply to the inquiry whether the instrument was or was not negotiable.<sup>1</sup> This should be borne in mind in reading the Illustrations of Rules 167 and 168.

### Illustrations.

1. A Bank of England note is stolen by *N* from *A*. *N* pays it away to *X*, who receives it *bonâ fide* for value. The property in the note passes to *X* on delivery. *X* is entitled to retain the note as against *A*.<sup>2</sup>

2. Scrip issued by the Russian Government is purchased for *A* by his broker *N*, in whose hands *A* leaves it. *N* fraudulently deposits the scrip with *X*, a banker, who takes it *bonâ fide*, as security for a loan to *N*. Under the custom of merchants in England this Russian scrip is treated as a negotiable instrument. It is a negotiable instrument, and *X* is entitled to retain the scrip as against *A*.<sup>3</sup>

3. An inland bill of exchange is stolen by *N* from *A*. It is paid away for value to *X*, a money-changer, who takes it *bonâ fide*. It is a negotiable instrument. *X* is entitled to retain it as against *A*.

4. *A & Co.* are owners of debentures issued by an English company in England payable to bearer. By reason of the conditions imposed on the debentures they are not promissory notes. *N*, a secretary of *A & Co.*, fraudulently takes the debentures, and pledges them with *X* for a loan made by *X* to *N*. *X* takes the debentures in good faith. Such debentures have in the English mercantile world and on the Stock Exchange for many years been by mercantile custom treated as negotiable instruments transferable by mere delivery. *X* has a right to retain the debentures as against *A*.<sup>4</sup>

5. Debenture bonds payable to bearer are issued by an English company in England, and by foreign companies abroad. They are not promissory notes. They are bought by *A* and stolen from him by *N*, his clerk. They are purchased *bonâ fide* for value from

<sup>1</sup> See especially *Pickler v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515, 519, 520, judgment of Bowen, L. J.

<sup>2</sup> *Miller v. Race* (1757), 1 Burr. 452; 1 Sm. L. C. (10th ed.) 447.

<sup>3</sup> *Goodwin v. Roberts* (1876), 1 App. Cas. 476; *Gorgier v. Mievile* (1824), 3 B. & C. 45.

<sup>4</sup> *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658.



a broker employed by *N* by *X & Co.*, brokers on the London Stock Exchange. Bonds of this description have been for a few years treated by the usage of the English mercantile world and of the Stock Exchange as negotiable instruments. The bonds are negotiable instruments in virtue of this usage, and *X & Co.* are entitled to retain them as against *A*.<sup>1</sup>

6. Bonds are issued by the Prussian Government. They are stolen from *A*. The bonds come into the hands of *N*, by what means does not appear. *N* deposits them with *X & Co.*, English bankers, to secure an overdraft. *X & Co.* take the bonds *bonâ fide*. The bonds are negotiable instruments in Prussia, but there is no custom of merchants in this country to treat them as negotiable. *X & Co.* are not entitled to retain the bonds as against *A*, *i.e.*, though negotiable in Prussia they are not negotiable in England.<sup>2</sup>

#### (H) INTEREST.

RULE 169.—The liability to pay interest, and the rate of interest payable in respect of a debt or loan, is determined by the proper law of the contract under which the debt is incurred or the loan is made.<sup>3</sup>

#### Comment.

If interest is payable on a debt or loan, it must be so under the contract between the parties. Whatever law, therefore, governs the contract must determine all questions relating to interest. The law of the contract will indeed in general be the law of the country where the debt is to be paid or loan repaid. "The general rule is, that interest is to be paid on contracts according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid. . . .

<sup>1</sup> *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 141.

<sup>2</sup> *Pucker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515.

<sup>3</sup> See Nelson, p. 279; Story, s. 291. Compare Westlake, p. 258; *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121, 140; *Arnott v. Redfern* (1825), 2 C. & P. 88. See Bar (Gillespie's transl., 2nd ed.), ss. 264—266, pp. 578—587, for statement of the different views maintained with reference to the laws governing the payment of interest, and note that the Scotch cases cited by Gillespie, pp. 585—587, support Rule 169. For the meaning of the term "proper law of the contract," see Rule 146, p. 529, *ante*.

"Thus a note made in Canada, where interest is six per cent., payable with interest in England, where it is five per cent., bears English interest only. Loans made in a place bear the interest of that place, unless they are payable elsewhere. And, if payable in a foreign country, they may bear any rate of interest not exceeding that which is lawful by the laws of that country."<sup>1</sup> But the reason why questions relating to interest are determined in general by the law of the place where the money owing or lent must be paid or repaid is that such law is in general the proper law of the contract. The principle to be kept in mind is, therefore, that interest is determined by the law governing the contract.<sup>2</sup>

### Illustrations.

1. *X* borrows money from *A* in India. The loan is repayable in India. The loan bears Indian interest,<sup>3</sup> *i.e.*, whether and what interest is payable is determined, as far as it depends upon law, by the law of India.

2. In 1829 a bill of exchange is drawn and accepted in Paris, but made payable in England. No rate of interest is expressed to be payable on the bill. Default having been made in payment of the bill, the rate of interest payable is to be determined by English law.<sup>4</sup>

3. *X* agrees with *A* in London to pay *A* commission for services to be rendered by *A* in Scotland. A debt of 200*l.* is due under the contract from *X* to *A*. Whether the debt carries interest is to be determined by the law of England (?).<sup>5</sup>

<sup>1</sup> Story, s. 291.

<sup>2</sup> This is very well put by Nelson, p. 279. As to interest, see *Connor v. Bellamont* (1742), 2 Atk. 382; *Stapleton v. Conway* (1750), 3 Atk. 727; *Bodily v. Bellamy* (1760), 2 Burr. 1094; *Dewar v. Span* (1789), 3 T. R. 425; *Arnott v. Redfern* (1825), 2 C. & P. 88; *Anon.* (1825), 3 Bing. 193; *Thompson v. Powles* (1823), 2 Sim. 194.

<sup>3</sup> Compare *Thompson v. Powles* (1823), 2 Sim. 194, with *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121.

<sup>4</sup> *Cooper v. Earl Waldegrave* (1840), 2 Beav. 282. See Chalmers (6th ed.), p. 245; but compare Rule 163 (2), p. 592, *ante* (Bills of Exchange Act, 1882, s. 72), and Rule 164, p. 597, *ante* (Bills of Exchange Act, 1882, s. 57).

<sup>5</sup> See *Arnott v. Redfern* (1825), 2 C. & P. 88. Compare *Connor v. Bellamont* (1742), 2 Atk. 382.

(I) *CONTRACTS THROUGH AGENTS.**Contract of Agency.*

RULE 170.<sup>1</sup>—An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.

*Comment.*

If *P*, a principal, in Spain, constitutes *A* his agent, Spanish law is "a circumstance to be taken into account in considering the "nature and extent of the authority given by [*P* to *A*], but the "Spanish law is not . . . material for any other purpose."<sup>2</sup> If a principal, that is to say, in a particular country, there appoints an agent, it is to be presumed that the authority of the agent, as between him and the principal, is governed by the law of such country, *e.g.*, Spain. The contract of agency, in short, is, like other contracts, governed by its proper law, which is in general the law of the place where the contract is made (*lex loci contractus*).<sup>3</sup>

*Illustration.*

*P*, a Spaniard, living in Spain, there constitutes *A* his agent for the sale of goods, under a document written in Spanish. The authority of *A*, as between *P* and *A*, must be determined in accordance with Spanish law.

*Relation of Principal and Third Party.*

RULE 171.<sup>4</sup>—When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in

<sup>1</sup> *Maspons v. Mildred* (1882), 9 Q. B. D. (C. A.) 530, 539, judgment of Lindley, L. J. Compare *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79, 83, judgment of Esher, M. R.

<sup>2</sup> *Maspons v. Mildred* (1882), 9 Q. B. D. (C. A.) 530, 539, per Curiam.

<sup>3</sup> See pp. 563—565, *ante*.

<sup>4</sup> See *Pattison v. Mills* (1828), 1 Dow & Cl. 342, 363. Compare Scotch case, *Delaurier v. Wyllie* (1889), Ct. Sess. Rep. (4th ser.) xvii., p. 191, for language of Lord Kyllachy.

general, governed by the law of such other country, *i.e.*, the country where the contract is made (*lex loci contractus*).

#### Comment.

“If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them.”<sup>1</sup>

These words contain a rough statement of the principle which determines the position of a principal in one country who, through an agent, makes contracts in another.

Hence ensues the consequence that if *P* in one country gives *A* a written authority in general terms to act for him as regards certain matters, *e.g.*, the sale and purchase of goods in different countries, *A* may be presumed to have in each country authority to act in accordance with the laws thereof, and in short to do any of the acts which an agent of his class may do under the law of such country.

If, for example, *P* in Brazil gives authority in general terms to *A*, under an instrument written in Portuguese, to act for him in different countries, then “if we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that, in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document [appointing the agent], and not putting a different construction on it in different countries. The one meaning that [the principal] had was: ‘I give an authority which, if carried out in England, is to be carried out according to the law of England; if in France, according to the law of France.’ That is one meaning, though this authority is to be applied in a different way in different places.

“If that is so, then the way to express that in the present case is this. This authority was given in Brazil, and the meaning is to be established by ascertaining what [*P*] meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the

<sup>1</sup> *Pattison v. Mills* (1828), 1 Dow & Cl. 342, 363, per Lyndhurst, C.

“writer is to be ascertained by evidence of competent translators and experts, including, if necessary, Brazilian lawyers, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority, in any country in which the authority is to be acted upon, is to be taken to be according to the law of the particular country where it is acted upon.”<sup>1</sup>

In other words, *A* may be taken by third parties to have in England the authority which, under English law, belongs to agents of the same class as *A*.<sup>2</sup>

Under our Rule, the rights and liabilities of a principal in a foreign country who contracts through an agent in England are governed by the law of England, and not by the law of the country (*e.g.*, France) where the principal resides. But our Rule does not in any way preclude the possibility that English law may contain special rules as to the legal position of a foreign principal.<sup>3</sup> So, again, if an English principal enters into a contract in a foreign country through an agent, his rights and liabilities under the contract are governed by the law of the foreign country, not of England; but it does not follow from this that, under the law of the foreign country (*e.g.*, France) the rights and liabilities of an English principal are the same as those of a French principal.

### Illustrations.

1. *P* (principal), a merchant living in England, makes through *A* (agent) in Scotland a contract with *T* (third party) which is

<sup>1</sup> *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79, 83, 84, judgment of Esher, M. R. Conf. judgment of Lindley, L. J., p. 85. The reasoning of Lord Esher is (it is submitted) not quite satisfactory. If *P*, a Brazilian, appoints *A* to sell goods for *P* in England, and appoints him under a Brazilian document, it is, no doubt, reasonable to suppose that *P* employs *A* to act according to the law of England, *i.e.*, not to do anything forbidden by the law of England, and not to make arrangements which are invalid by the law of England; but can it necessarily be inferred that the extent of *A*'s authority as regards, at any rate, a third person who knows of the existence of the document appointing *A*, is to be measured by the law of England? The assumption is (it is submitted) equally reasonable that *A*'s authority is governed by Brazilian law, under which the appointment was made. Probably all that Lord Esher's language means is that, where the terms of the instrument appointing *A* are general, he must be presumed to have the authority possessed by an agent of *A*'s class under English law.

• <sup>2</sup> *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79.

<sup>3</sup> See Leake, *Contracts* (4th ed.), p. 336. See *Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598, 605.

valid according to Scotch, but not according to English law. The contract is governed by Scotch law.<sup>1</sup>

2. *P* in France, through *A* in England, engages *T* to serve *P* in London as a domestic servant. *P*'s rights and liabilities are governed by English law.

3. *P*, a Spaniard in Spain, through *A*, a Spaniard in England, effects an insurance with *T*, a London underwriter, on *P*'s ship. *P*'s name is not disclosed to *T*. *P*'s rights and liabilities are governed by English law.<sup>2</sup>

4. *P*, a merchant of New Orleans, orders goods from *A*, a commission agent in England, who procures them from *T*, an English manufacturer. *P*'s rights and liabilities are governed by English law, and not by the law of Louisiana.<sup>3</sup>

<sup>1</sup> *Pattison v. Mills* (1828), 1 Dow & Cl. 342.

<sup>2</sup> See *Maspons v. Muldred* (1882), 9 Q. B. D. (C. A.) 530, 541; *Maunss v. Henderson* (1801), 1 East, 335.

<sup>3</sup> *Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598, 605.

## CHAPTER XXVII.

## MARRIAGE.

(A) *VALIDITY OF MARRIAGE*.<sup>1</sup>

RULE 172.—Subject to the exceptions hereinafter mentioned, a marriage is valid when

- (1) each<sup>2</sup> of the parties has, according to the law of his or her respective domicile, the capacity<sup>3</sup> to marry the other, *and*,
  - (2) any one of the following conditions as to the form<sup>4</sup> of celebration is complied with (that is to say):
    - (i) if the marriage is celebrated in accordance with the local form;<sup>5</sup> or,
    - (ii) if the parties enjoy the privilege of extritoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the State<sup>6</sup> to which they belong;<sup>7</sup>
- OR,

<sup>1</sup> Savigny, s. 379, p. 290; s. 381, pp. 318—325; Westlake, pp. 53—68; Story, ss. 79—81, 107—124*b*; Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23). For the meaning of the term “marriage” in this Digest see Rule 48, pp. 256, 257, and p. 260, *ante*.

<sup>2</sup> This Rule is only affirmative. See Rule 173, Exception 1, p. 633, *post*. Conf. as to capacity to contract, Rule 149, p. 534, *ante*.

<sup>3</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, compared with *Sottomayor v. De Barros* (1879), 5 P. D. 94; *Mrs. Bulkley's Case*, in the French Courts, cited in note to *Pitt v. Pitt* (1864), 4 Macq. 649; *Brook v. Brook* (1861), 9 H. L. C. 193; *In re Bozzelli's Settlement*, *Hussey-Hunt v. Bozzelli*, [1902] 1 Ch. 751.

<sup>4</sup> *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54; *Serimshire v. Serimshire* (1752), 2 Hagg. Cons. 395; *Herbert v. Herbert* (1819), 2 Hagg. Cons. 263; *Smith v. Maxwell* (1824), Ryan & Moody, 80; *Swift v. Kelly* (1835), 3 Knapp. 257.

<sup>5</sup> For meaning of “local form,” see Rule 150 (1), p. 540, *ante*. The contract of marriage is obviously made in the country where the marriage is celebrated. *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46.

<sup>6</sup> As to application of this sub-clause where a State, *e.g.*, the British Empire, consists of several countries, see p. 620, note 4, *post*.

<sup>7</sup> *Pertreus v. Tondear* (1790), 1 Hagg. Cons. 136; *Lautour v. Teesdale* (1816), 8

- (iii) if the marriage [being between British subjects?] is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible;<sup>1</sup> or,
- (iv) if the marriage is celebrated in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, s. 22, within the lines of a British Army serving abroad; or,
- (v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892,<sup>2</sup> by or before a marriage officer<sup>3</sup> (such, for example, as a British ambassador<sup>4</sup> or British consul),<sup>5</sup> within the meaning of, and duly authorised to be a marriage officer under, the said Act.<sup>6</sup>

Taunt. 830; *Rex v. Brampton* (1808), 10 East, 282. See also Marriage Commission Report, p. 1.

<sup>1</sup> *Ruding v. Smith* (1821), 2 Haggr. Cons. 371; Cruise on Dignities, 276; *Waldegrave Peerage Case* (1837), 4 Cl. & F. 649; *Lloyd v. Petitjean* (1839), 2 Curt. 251; *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705.

<sup>2</sup> See the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 1; and *Hay v. Northcote*, [1900] 2 Ch. 262.

<sup>3</sup> *Ibid.*, ss. 1, 11, 12.

<sup>4</sup> *Ibid.*, s. 11, sub-s. (2) (a).

<sup>5</sup> *Ibid.*, s. 11, sub-s. (2) (b).

<sup>6</sup> *Ibid.*, ss. 11, 12. Note particularly that a marriage officer within this sub-clause must be authorised to be a marriage officer either under the warrant of a Secretary of State, termed a marriage warrant (*ibid.*, s. 11, sub-s. (1) (a)), or under marriage regulations issued under the Foreign Marriage Act, 1892. *Ibid.*, s. 11, sub-s. (1) (b), and compare generally all the provisions of ss. 11, 12, 21.



## Comment and Illustrations.

The validity of a marriage under this Rule depends on the fulfilment of two conditions: first, on the *capacity* of the parties to marry each other; secondly, on the celebration of the marriage in due *form*: the word “form” includes all the formalities necessary to the validity of a marriage.

(1) *Capacity.*

The capacity of each of the parties to a marriage is to be judged of by their respective *lex domicilii*.<sup>1</sup> If they are each, whether belonging to the same country<sup>2</sup> or to different countries, capable according to their *lex domicilii* of marriage with the other, they have the capacity required by Rule 172, and their marriage is, as far as capacity is concerned, valid. In short, “as in other contracts, “so in that of marriage, personal capacity must depend on the law “of domicil.”<sup>3</sup>

*H* and *W* are Portuguese subjects, but domiciled in England. Being first cousins, they are, by the law of Portugal, incapable of contracting a valid marriage with each other. They are duly married in London, according to the forms required by English law. Their marriage is valid.<sup>4</sup>

In 1871 *W*, an Englishwoman, domiciled in England, marries an Italian subject domiciled in Italy. After the death of her first husband *W*, being still domiciled in Italy, marries, in 1880, *H*, the brother of her deceased husband, also an Italian subject, domiciled in Italy. The required dispensation for the marriage is obtained both from the civil and from the ecclesiastical authorities. The second marriage is celebrated in Milan both civilly, and in church, according to the rites of the Roman Catholic Church. The marriage is valid.<sup>5</sup>

(2) *Form.*

(i) *Local form.*<sup>6</sup> A marriage celebrated in the mode, or

<sup>1</sup> See, as to capacity to contract, Rule 149, p. 534, *ante*.

<sup>2</sup> For meaning of “country,” see pp. 67, 69, *ante*.

<sup>3</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.), 1, 5, per Curiam.

<sup>4</sup> Compare *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, with *Sottomayor v. De Barros* (1879), 5 P. D. 94. See, further, comment on Rule 173, p. 629, *post*.

<sup>5</sup> *I.e.*, in England. See *In re Bozzelli's Settlement*, [1902] 1 Ch. 751, 756. This case gives full effect to the principle that “the capacity of the parties must be determined by the law of their domicil.”

<sup>6</sup> See sub-clause (i), p. 613, *ante*. The Courts will sometimes, when some evidence is given that persons who have lived as reputed husband and wife have

according to the rites or ceremonies, held requisite by the law of the country where the marriage takes place,<sup>1</sup> is (as far as formal requisites go) valid. Our Courts in this matter give effect to the principle that the form of a contract is governed by the law of the place where the contract takes place, and hold that, though under certain circumstances other forms may be sufficient, yet that the local form always suffices, and that in general "the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted."<sup>2</sup>

In two respects, an extremely wide extension has been given to the principle contained in these words.

In the first place, the consents of and the notices to parents or others, necessary by many laws to the validity of a marriage, are considered as part of the form or ceremony of the marriage.<sup>3</sup>

gone through some marriage ceremony in a foreign country, presume, on very slight grounds, that the local form of marriage was followed. *In re Shephard*, [1904] 1 Ch. 656.

<sup>1</sup> As to formal validity of contract, see Rule 150, p. 540. *ante*.

<sup>2</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.), 1, 5, per Curiam; *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.

<sup>3</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 7, per Curiam. This doctrine is now fully established by decided cases, but is logically open to criticism. A person who cannot marry without the consent of another is, *pro tanto*, under an incapacity, and, on the principle that capacity depends on the *lex domicilii*, the want of such consent ought to invalidate a marriage wherever it takes place.

The earlier English decisions did not distinguish between *capacity* and *form*, and brought both one and the other within the principle that the validity of a contract depends on the *lex loci contractus*. It was, therefore, laid down that the validity of a marriage celebrated in Scotland was to "be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of [a person's] marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." (*Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54, 58, 59, per Sir W. Scott.) Hence the validity both of so-called Gretna Green marriages and of marriages in foreign countries, though purposely celebrated out of England to evade the requirements as to consents of the English marriage law, became firmly established by a series of cases, the effect of which could not be reversed except by legislation. See *Commonwealth v. Lane* (1873), 113 Mass. 458 (Am.).

At a later period the Courts distinguished between capacity for marriage and the forms of marriage, holding that questions of capacity depended, in part at least, on the *lex domicilii*. (*Brook v. Brook* (1861), 9 H. L. C. 193.) The decisions with respect to Scotch marriages could not then be reversed; and in order to reconcile them with the new distinction between capacity and form, the Courts were driven to adopt the logically very doubtful theory that the question of consent belongs to the marriage ceremony. See App., Note 5, "Preference of English Courts for *lex loci contractus*."

In the second place, the validity of a marriage is in no degree affected by the fact that the object of the parties in marrying away from their own country is to evade the requirements of the law of their domicil as to consents, publicity, &c., or that no regular ceremony is required by the law of the country where the marriage takes place.<sup>1</sup>

Hence, on the one hand, marriages between domiciled English persons, celebrated in a foreign country, are valid if solemnised according to the forms required by the law of the country (*e.g.*, Scotland or France) where the marriage takes place;<sup>2</sup> and on the other hand, the marriage in England of foreigners (*e.g.*, French subjects domiciled in France) is, if duly celebrated according to the forms of English law, held valid here, even though it may be pronounced invalid by a French Court for want of the consents required by French law, or because the parties meant to evade the operation of French law.

*H*, an English infant domiciled in England, wishes to marry *W*, an Englishwoman. To evade the opposition of his guardians *H* goes to Scotland, and resides there for four weeks.<sup>3</sup> *W* then joins *H* in Scotland, and they are privately married there, *per verba de presenti*, *i.e.*, by the mere statement in the presence of witnesses that they are man and wife. The marriage is valid.<sup>4</sup>

*H* and *W*, British subjects domiciled in England, and both of them infants, are privately married at Madrid by a Roman Catholic priest. The marriage, if valid by Spanish law, is valid here.<sup>5</sup>

*H* and *W* are French subjects domiciled in France. *H* cannot obtain his father's consent to the marriage. To avoid the necessity

<sup>1</sup> *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54; *Serimshire v. Serimshire* (1752), 2 Hagg. Cons. 395; *Swift v. Kelly* (1835), 3 Knapp, 257; *Somonu v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97. See remarks of Lord Brougham in *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 548.

<sup>2</sup> *Ibid.* But see, as to the kind of form required, *Burt v. Burt* (1860), 2 Sw. & Tr. 88; *Reg. v. Allen* (1872), L. R. 1 C. C. 367, 376, *per Curiam*.

<sup>3</sup> Residence of one of the parties in Scotland for twenty-one days is now required under 19 & 20 Vict. c. 96, s. 1.

<sup>4</sup> *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54. Where an Englishman, *H*, and a British subject lived in Minnesota with a woman, *W*, as her reputed husband, and it was shown that under the law of Minnesota marriage is a contract depending wholly on the consent of the parties, which can be entered into without any formality, and that persons living together in Minnesota as reputed husband and wife are presumed to have entered into a contract of marriage, an English Court has (*semble*) presumed, in the absence of evidence to the contrary, that there was a valid marriage between *H* and *W*. *Newman v. Att.-Gen.*, *Times*, 27 Feb. 1906.

<sup>5</sup> *Swift v. Kelly* (1835), 3 Knapp, 257.

for such consent, *H* and *W* come to England, and are there married by licence in accordance with English law. The marriage is invalid in France for want of the due consents, but is held valid by our Courts.<sup>1</sup>

With reference to a case such as this, the Court of Appeal thus expressed itself:—

“The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not, under the circumstances, by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage.”<sup>2</sup>

(ii) *Exterritoriality*.<sup>3</sup>—The subjects of a State are, under certain circumstances, when in fact not residing within the limits of such State, considered by a fiction of law to be resident there, and to be subject to its laws. This fiction is termed *exterritoriality*.<sup>4</sup>

The effect of exterritoriality as regards marriage<sup>5</sup> is, that where it applies a marriage is valid though not celebrated according to the ordinary local forms of the place of celebration, and is treated as though it had been in fact celebrated in the country in which it is supposed by a fiction of law to have been solemnised.

The principle of exterritoriality applies to marriages celebrated in the mansion of an ambassador; to marriages celebrated at foreign factories and certain places, mainly found in the East, in which Europeans enjoy the privileges of exterritoriality; and lastly to marriages celebrated on board ship.<sup>6</sup>

<sup>1</sup> *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.

<sup>2</sup> *Sottomayor v. De Barros* (1877), 3 P. D. 1, 7, per Curiam.

The form need not necessarily be the form required by the *lex loci* in ordinary cases. All that is essential in order to bring a marriage within clause (i) is that it should be contracted in a form which, according to the law of the country where the marriage takes place, is sufficient, under the circumstances of the particular case, to constitute a valid marriage. Suppose, for example, that the law of France were that marriages between British subjects might be validly contracted in France if celebrated in accordance with the rites of the Church of England without any further ceremony. Then a marriage at Paris between *H* and *W*, British subjects, celebrated according to the rites of the Church of England, would be valid here, as being celebrated according to the form required by the *lex loci contractus*.

<sup>3</sup> See sub-clause (ii), p. 613, *ante*.

<sup>4</sup> See Woolsey, *International Law* (3rd ed.), s. 64.

<sup>5</sup> *Pertreix v. Tondear* (1790), 1 Hagg. Cons. 136; *Lautour v. Teesdale* (1816), 8 Taunt. 830; *Rex v. Brampton* (1808), 10 East, 282.

<sup>6</sup> The application of the principle in the last case is somewhat different from its application in the first two cases.

*Marriages at Ambassador's.*—The mansion of an ambassador is treated as part of the country which he represents. Hence marriages there by subjects of that country are good if celebrated according to forms held valid by its laws.

*H* and *W*, British subjects, are married, according to the rites of the Church of England, at the British Embassy at Paris. Their marriage is, independently of Acts of Parliament,<sup>1</sup> valid in England, and would, it may be added, be held valid elsewhere.

*H* and *W*, Spanish subjects, are married according to Spanish forms at the Spanish Embassy in London. Their marriage is valid in England and elsewhere.

This privilege of extritoriality probably extends only to cases where *both parties* are subjects of the ambassador's sovereign. It certainly does not extend to cases where neither of the parties are his subjects.

The marriage between *H*, a foreigner, in the suite of the Spanish ambassador, and *W*, who was not a Bavarian subject, was celebrated at the chapel of the Bavarian ambassador in London. It was held invalid on the following grounds:—

“The party who proceeds was in the suite of the Spanish ambassador, and not of the Bavarian; and the other party, though she has the name of a foreigner, is not described as being of any ambassador's family, and has been resident in this country four months, which is much more than is necessary to constitute a matrimonial domicile in England, inasmuch as one month is sufficient for that under the Act of Parliament. Supposing the case, therefore, to be assimilated to that of a marriage abroad between persons of a different country, it is difficult to bring this marriage within the exception, as this woman is not described as domiciled in the family of the ambassador. Taking the privilege to exist in ambassadors' chapels (which has, perhaps, not been formally decided), I may still deem it a fit subject of consideration whether such a privilege can protect a marriage where neither party, as far as appears at present, is of the country of the ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shown that she had been living in a house entitled to privilege during her residence in England. On these grounds I shall admit the

•  
<sup>1</sup> See Rule 172, sub-clause (ii), p. 613, *ante*. Whether such a marriage is now valid if it does not conform to the provisions of the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23)? *Seemle*, it is valid. See *ibid.*, s. 23.

"libel. The matter may receive further illustration of facts which may entitle it to further consideration."<sup>1</sup>

*Marriage at foreign factories.*—It was at one time common in all lands, and is still common in the East, for the government of the country to allow to foreigners, at any rate within the limits of factories or trade settlements, the use of their own laws. In this case the factory is regarded as part of the country to which it belongs, and persons marrying there may make a valid marriage by celebrating it according to the law of that country.

"In foreign countries where, either by express treaty or by the comity of nations, the privilege of extritoriality has been enjoyed by British subjects within any defined limits, such as the factory of a trading company or the hotel of an ambassador, the marriage of a British subject, solemnised within such limits, according to the law of England, as it existed antecedent to the passing<sup>2</sup> of Lord Hardwicke's Act, has always been upheld by English Courts as a valid marriage."<sup>3</sup> The rule applied to the marriages of British subjects no doubt also applies to those of foreigners. *H* and *W*, for example, French subjects, marry at a French factory in Turkey, according to French forms. Their marriage will be held valid by English Courts.

*Marriages on shipboard.*—Any ship on the high seas, and a ship of war even when in a foreign port, is deemed part of the country to which the ship belongs. Marriages, therefore, on shipboard are in general valid, if good by the law of such country.<sup>4</sup>

<sup>1</sup> *Petrie v. Tondear* (1790), 1 Hagg. Cons. 136, 138, 139, per Curiam. It may be assumed, though the point cannot be treated as judicially decided, that the privilege of extritoriality does not in England extend to any British subject. Mar. Comm. Rep., 1868, p. xxxviii.

<sup>2</sup> *I.e.*, marriage before an episcopally ordained clergyman, *e.g.*, a clergyman of the Church of England, a Roman Catholic priest, or a priest of the Greek Church. *Reg. v. Millis* (1844), 10 Cl. & F. 534.

<sup>3</sup> Mar. Comm. Rep., 1868, p. 1. See Foreign Marriage Act, 1892, s. 23.

<sup>4</sup> The application of the principle of extritoriality to the marriages of British subjects presents some difficulty, owing to the fact that they are citizens of a State which consists of different countries (see pp. 67, 69, *ante*). Hence the inquiry may be raised, what is the law by which a British subject, for instance, on board a British merchant ship on the high seas, is governed, and by which the validity of his marriage on shipboard is to be determined? Is it the common law of England, or the statute law and common law combined, or the law of the country (*e.g.*, Scotland) where he is domiciled, or where the ship is registered?

The answer to these and other questions of a like sort appears to be that, in the cases to which the principle of extritoriality applies, a British subject must be taken to be under the rule of the common law of England.

The correctness of this view, though open to question, appears to me confirmed

*H* and *W*, British subjects, marry on board a British merchant vessel on the high seas. The marriage service is performed by a Roman Catholic priest. The marriage, being good at common law, is valid.<sup>1</sup>

(iii) *Use of the local form impossible*.<sup>2</sup>—Sub-clause (iii) applies to marriages in countries where it is strictly impossible for the parties to use a local form.

The impossibility may arise from the country being one where no local form of marriage recognised by civilised States exists, as where the marriage takes place in a land inhabited by savages, or it may arise from the form being one which it is morally or legally impossible for the parties to use. On this ground, a marriage between Protestants, celebrated at Rome by a Protestant clergyman, was admitted to be valid by Lord Eldon, on its being sworn

by the principle that British subjects settling in a newly-discovered country carry the law of England with them (1 Blackstone, pp. 107, 108); by the rules as to Anglo-Indian domicile (pp. 156—158, *ante*); and by the language of the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 3.

The questions which may be raised as to the law which governs British subjects when on board a British ship may, of course, also be raised as to the law which governs them when they are within the limits of a British Embassy, or of a country where British subjects can claim the privilege of extritoriality; but marriages of British subjects in foreign countries are now to such a great extent regulated by the Foreign Marriage Act, 1892, that questions as to the validity of such marriages, independently of this Act, are unlikely to arise.

*H* and *W*, Scotch persons domiciled in Scotland, contract marriage on board a British merchant ship on the high seas, *per verba de presenti*. No minister is present at the time of the making of the contract. The marriage is probably invalid. But it is possible that in such a case the validity of the marriage depends on the law of the country (*viz.*, Scotland) where the parties are domiciled. Yet this does not meet the difficulty which may be raised where the respective domicils of the parties are different.

The difficulties which exist in applying the principle of extritoriality to the marriages of British subjects may exist in applying it to the marriages of persons belonging to other States, such as the Austro-Hungarian Empire, consisting of different countries with different marriage laws.

<sup>1</sup> *Reg. v. Mills* (1844), 10 Cl. & F. 534. The validity of such a marriage is not (*semble*) in any way affected by the Foreign Marriage Act, 1892. The authority of *Reg. v. Mills* is, to a certain extent, doubtful. It has not been followed in the Canadian Courts (*Breaky v. Breaky*, 2 U. C. Q. B. 349), and it has been severely criticised in the Ecclesiastical Courts. *Catterall v. Catterall* (1847), 1 Rob. Ecc. 580. *Conf. Culling v. Culling*, [1896] P. 116; and 2 Pollock & Maitland, *Hist. of Eng. Law*, pp. 370—372.

It has not been followed in the United States. See, especially, Wharton (2nd ed.), s. 172, note 1, where *Reg. v. Mills* is fully discussed and entirely disapproved of. It is, however, clearly binding on English Courts. Whether it is binding on Colonial Courts, the appeal from which is to the Privy Council, not to the House of Lords?

<sup>2</sup> See sub-clause (iii), p. 614, *ante*; *Lightbody v. West* (1902), 87 L. T. 138.

that two Protestants could not there be married in accordance with the *lex loci*, as no Roman Catholic priest would be allowed to marry them.<sup>1</sup> On the same ground, marriages in heathen or Mahomedan<sup>2</sup> countries would be held valid, even though not in accordance with the local form. The validity, again, of marriages celebrated abroad, in accordance with the English common law, within the lines of a British army, may possibly (independently of statutory enactments)<sup>3</sup> be placed on the ground of the impossibility of complying with the local form.

That sub-clause (iii) may apply there must be an impossibility amounting to an insuperable difficulty<sup>4</sup> in complying with the local form. "Where persons [are] married abroad, it [is] necessary to "show that they were married according to the *lex loci*, or that they "could not avail themselves of the *lex loci*, or that there was no *lex loci*."<sup>5</sup> Mere difficulty in fulfilling the conditions imposed by the local law is not enough. Thus the fact that the law of a country does not allow persons to intermarry who have not resided there for six months does not enable British subjects who have resided there for a shorter period to make a valid marriage without complying with the requirements of the local law.<sup>6</sup>

The cases as to marriages held valid on account of the impossibility of complying with the local form are not numerous, and refer to the marriages of British subjects. It may, however, be assumed that, when compliance with the local form is impossible, our Courts will hold the marriages of foreigners valid, at any rate if held good by the law of the country where the foreigners are domiciled. If, for example, *H* and *W*, Italian subjects domiciled in Italy, intermarry in China in accordance with a form held under the circumstances valid by the Italian tribunals, our Courts will probably hold the marriage good.<sup>7</sup>

Sub-clause (iii) applies, from its nature, only to marriages taking place beyond the limits of the British dominions.<sup>8</sup>

<sup>1</sup> Cruise on Dignities, p. 276; Westlake (4th ed.), p. 62.

The Roman law was, as Westlake points out, incorrectly stated.

<sup>2</sup> Supposing, of course, that the local marriage form involved ceremonies in which Christians could not take part.

<sup>3</sup> See, however, the Foreign Marriage Act, 1892, s. 22.

<sup>4</sup> *Kent v. Burgess* (1840), 11 Sim. 361, 376.

<sup>5</sup> Per Eldon, C.; Cruise on Dignities, p. 276.

<sup>6</sup> *Kent v. Burgess* (1840), 11 Sim. 361.

<sup>7</sup> See 2 Fraser, Husband and Wife (2nd ed.), pp. 1313, 1314.

<sup>8</sup> A marriage could never be valid under sub-clause (iii) if it came within sub-clause (v), i.e., could be celebrated under the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23).



(iv) *Marriage within the lines of a British army.*<sup>1</sup>—"It is hereby declared that all marriages solemnised within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnised within the United Kingdom, with a due observance of all forms required by law."<sup>2</sup>

This enactment, which in substance re-enacts part of 4 Geo. IV. c. 91, s. 1, applies apparently not only to marriages where one of the parties is a British subject, but also to marriages between aliens. The marriage is valid whether the British army be or be not in hostile occupation of a foreign country,<sup>3</sup> and whether the chaplain, officer, or other person celebrating the marriage is authorised by the commanding officer to celebrate the particular marriage or not.<sup>3</sup>

(v) *Marriages under the Foreign Marriage Act, 1892.*<sup>5</sup>—"All marriages between parties of whom one, at least, is a British subject, solemnised in the manner in this Act [Foreign Marriage Act, 1892] provided, in any foreign country or place, by or before a marriage officer within the meaning of this Act, shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law."<sup>6</sup>

These words give the effect of the Foreign Marriage Act, 1892. It provides modes in which (independently of the local form) a British subject may contract a valid marriage in a country outside the United Kingdom. The marriages to which it applies come in substance under four heads:—

(a) A marriage solemnised by or before a British ambassador<sup>7</sup> residing in a foreign country to the government of which he is accredited at his official residence.

<sup>1</sup> See sub-clause (iv), p. 614, *ante*.

<sup>2</sup> Foreign Marriage Act, 1892, s. 22. See *Waldegrave Peerage Case* (1837), 4 Cl. & F. 649; and compare 4 Geo. IV. c. 91, which is now repealed.

<sup>3</sup> *Waldegrave Peerage Case* (1837), 4 Cl. & F. 649.

<sup>4</sup> *I.e.*, other than a marriage within the lines of a British army.

<sup>5</sup> 55 & 56 Vict. c. 23. See Foreign Marriages Order in Council, Oct. 23, 1892; London Gazette, Friday, Nov. 4, 1892.

<sup>6</sup> Foreign Marriage Act, 1892, s. 1; *Hay v. Northcote*, [1900] 2 Ch. 262; and see p. 624, *post*.

<sup>7</sup> Or any officer prescribed as an officer for solemnising marriage in the official house of such ambassador. Compare Foreign Marriage Act, 1892, ss. 1, 8, 11, sub-ss. (1) (a) and (b), and (2) (a).

(b) A marriage solemnised by or before a British consul at his official residence.<sup>1</sup>

(c) A marriage solemnised on board one of His Majesty's ships on a foreign station by or before the commanding officer thereof.<sup>2</sup>

(d) A marriage solemnised by or before a Governor, High Commissioner, resident, consular, or other officer, at his official residence.<sup>3</sup>

The marriages under heads (a), (b), and (c)<sup>4</sup> must, apparently, be solemnised outside the British dominions. A marriage under head (d) (*e.g.*, by a Governor) may be solemnised at a place within the British dominions.<sup>5</sup>

For all details, the reader should consult the Foreign Marriage Act, 1892, but the following general points deserve notice:—

*First.* A marriage duly solemnised under the Foreign Marriage Act, 1892, is valid as regards form even though the local form be not observed.<sup>6</sup>

*Secondly.* The Foreign Marriage Act, 1892, has no bearing upon the capacity of the parties to intermarry. A marriage solemnised under that Act (*e.g.*, at a British consul's) is "as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law,"<sup>7</sup> but a marriage so solemnised in the United Kingdom may be invalid if the parties are incapable of intermarriage under the law of their domicile.<sup>8</sup> Hence a marriage (*e.g.*, before a British consul) would also be invalid if the parties were under an incapacity to intermarry by the law of their domicile.

*Thirdly.* A marriage under the Foreign Marriage Act, 1892, is subject to the provisions of the Act as to the authority of the

<sup>1</sup> Foreign Marriage Act, 1892, ss. 1, 8, 11, sub-s. 2 (b).

<sup>2</sup> *Ibid.*, s. 12.

<sup>3</sup> *Ibid.*, ss. 1, 8, 11, sub-s. 2 (c).

<sup>4</sup> One of His Majesty's ships is indeed technically part of the British dominions (see pp. 68, 71, 72, *ante*), but the Foreign Marriage Act, 1892, s. 12, applies to such a ship only when "on a foreign station."

<sup>5</sup> Foreign Marriage Act, 1892, s. 11, sub-s. 2 (c).

<sup>6</sup> Even though the marriage be held invalid in, and declared invalid by, the Courts of the country (*e.g.*, France) in which it is celebrated, and be held invalid because it was not celebrated in accordance with the formalities required by French law. *Hay v. Northcote*, [1900] 2 Ch. 262. See, however, Foreign Marriage Order in Council, 28th Oct., 1892; London Gazette, Fr., Nov. 4, 1892, especially clauses 4, 5.

<sup>7</sup> Foreign Marriage Act, 1892, s. 1.

<sup>8</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. See Rule 172, p. 613, *ante*, and Rule 173, p. 628, *post*.

marriage officer by or before whom the marriage is celebrated, as to the due observance of the required formalities, and the like.<sup>1</sup> And generally the right to solemnise, and the solemnisation of any marriage within the Act, is subject to "marriage regulations," to be made by order in council.<sup>2</sup>

Upon these regulations, which may be made either generally or with reference to any particular case, or class of cases,<sup>3</sup> depends to a great extent the operation of the Act.

*Fourthly.* It is an aim of the Act to prevent conflicts of law.

Marriage regulations may prohibit or restrict the exercise by marriage officers of their powers under the Act "where the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations."<sup>4</sup>

"A marriage officer [it is further provided] shall not be required to solemnise a marriage, or to allow a marriage to be solemnised in his presence, if in his opinion the solemnisation thereof would be inconsistent with international law or the comity of nations."<sup>5</sup>

Against such a refusal there is an appeal to a Secretary of State.<sup>5</sup>

Section 19 of the Foreign Marriage Act, 1892, would, it may be conjectured, hinder the marriage under the Act (*e.g.*, in Portugal) of persons, such as first cousins, held by Portuguese law to be incapable of intermarriage.

*Fifthly.* "Nothing in this Act," it is provided, "shall confirm or impair or in anywise affect the validity in law of any marriage solemnised beyond the seas, otherwise than as herein provided, and this Act shall not extend to the marriage of any of the Royal family."<sup>6</sup>

Under this section any marriage (it is submitted), whether celebrated before or after the 1st January, 1893,<sup>7</sup> which would have been legally valid if the Act had not passed, still remains valid. Hence, not only is any marriage valid which is celebrated according to the local form, but also, it would seem, any marriage which is valid at common law under the principle of extraterritoriality. Thus, if *H* and *W* are married by a priest in holy orders on board

<sup>1</sup> Foreign Marriage Act, 1892, ss. 12—16.

<sup>2</sup> *Ibid.*, s. 21, and see Order in Council, 28th Oct., 1892.

<sup>3</sup> *Ibid.*, s. 21, sub-s. 2.

<sup>4</sup> *Ibid.*, s. 21, sub-s. 1 (a), and see Order in Council, 28th Oct., 1892.

<sup>5</sup> *Ibid.*, s. 19.

<sup>6</sup> *Ibid.*, s. 23.

<sup>7</sup> The date when the Act came into operation.

a British merchant vessel on the high seas in accordance with the rites of the Church of England, their marriage is apparently valid, and is also (it is submitted) valid when so solemnised on board a British man-of-war, even though the provisions of the Foreign Marriage Act, 1892, be not observed.<sup>1</sup>

*Sixthly.* The provisions of the Foreign Marriage Act, 1892, lessen the importance of the other forms in which a marriage may be duly celebrated, enumerated in sub-clauses (i), (ii), and (iii) of Rule 172.

*Exception 1.*<sup>2</sup>—A marriage is not valid if either of the parties, being a descendant of George II., marries in contravention of the Royal Marriage Act (12 Geo. III. c. 11).

#### Comment.

The Royal Marriage Act enacts in substance that, subject to

<sup>1</sup> It is a possible interpretation of this Act that it makes invalid marriages which ought to be celebrated in accordance with its provisions and are not so celebrated; but this construction of the Act is not required by its general scope, and is hardly consistent with sect. 23.

<sup>2</sup> "There is no necessity to make an exception, as is sometimes done, for marriages regarded as incestuous by the general consent of Christendom, because no country with which the communion of private international law exists has such marriages." Westlake, p. 60.

This observation is sound and has led to the omission of the exception referred to which, taken from Story, ss. 113 a, 114, appeared in the first edition of this work.

It is worth while noting that the motive or ground for prohibiting a marriage may be a guide in deciding what are the marriages and who are the persons intended by the legislature to be affected by the prohibition. Thus, if an Act of Parliament were to prohibit the marriage of first cousins, the Courts would probably hold that the ground of such a prohibition was not the immorality but the inexpediency of such a marriage, and would therefore draw the inference that the Act had no application to foreigners domiciled out of England. On the other hand, the suggestion has been made that the marriage between an uncle and his niece is prohibited as immoral, and therefore would, under no circumstances whatever, be recognised by our Courts. *Warrender v. Warrender* (1835), 2 Cl. & F. 531. The doubts, again, which may exist as to the limits within which English law refuses recognition to the marriage of a widow with her deceased husband's brother depend at bottom on the different views which may be entertained as to the real ground or motive for the prohibition of such a marriage. Note that marriage with a deceased husband's brother is valid in New Zealand, under the Deceased Husband's Brother Marriage Act, 1900, No. 72, which has received the assent of the Crown, and has been held valid by English Courts in the case of Italian subjects domiciled in Italy, where such a marriage is legal. *In re Bozzelli's Settlement*, [1902] 1 Ch. 751.

certain exceptions<sup>1</sup> and limitations, no descendant of George II. shall be capable of contracting matrimony without the previous consent of the sovereign signified in the manner provided by the Act, and that any marriage of such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.

*H*, a descendant of George II., married *W* at Rome, in accordance with the form required by the *lex loci*, without having obtained the consent required by the Act. He was, however, under no disability, either by English or by Roman law, except that which might arise from the contravention of the Royal Marriage Act. His marriage was held by our Courts to be absolutely void.<sup>2</sup>

The Act, and the case decided under it, give rise to two remarks:—

*First.* Though *H* was in fact domiciled in England and a British subject, his marriage would, in all probability, have been held invalid had he been domiciled at Rome, and probably even had he been an alien. The Act appears intended to apply to all the descendants (with a limited exception)<sup>3</sup> of George II.: and if this be the intention of the legislature, all Courts throughout the British dominions must, of course, give effect to it, whatever be the domicile or the allegiance of the persons affected by the Act.

*Secondly.* It is probable that foreign Courts would not give effect to the provisions of the Royal Marriage Act in the case of persons not domiciled in England, and that our Courts, on the other hand, would refuse to give effect to a similar law passed (*e.g.*, by the Italian Parliament) in the case of a person not domiciled in Italy. The incapacity, in short, produced by such a law would be regarded as constituting a privative status, which was not entitled to recognition by the Courts of any State except the State where the law was in force.<sup>4</sup>

*Exception 2.*—A marriage is, possibly, not valid if *either* of the parties is, according to the law of the

<sup>1</sup> See especially, s. 2, as to marriage of descendant of George II., when above twenty-five years of age.

<sup>2</sup> *Sussex Peerage Case* (1844), 11 Cl. & F. 85.

<sup>3</sup> *Viz.*, the issue of princesses marrying into foreign families. It is from this exception that the inference may be drawn that the Act applies to descendants of George II., who may not be British subjects.

<sup>4</sup> See Rule 125, p. 458, *ante*.

country where the marriage is *celebrated*, under an incapacity to marry the other.<sup>1</sup>

### Illustrations.

1. *H* and *W* are Italian subjects. They are both domiciled in Italy. *H* is the brother of *W*'s deceased husband. *H* marries *W* in a church in London in accordance with all the formalities required by English law. According to the law of Italy the marriage (the necessary dispensations being obtained), is legal.<sup>2</sup> The marriage between *H* and *W* is possibly not valid.<sup>3</sup>

2. *H* and *W*, his first cousin, are British subjects domiciled in England. While travelling in Portugal, where first cousins are legally incapable of marrying one another,<sup>4</sup> they are married in a Portuguese Church, in accordance with the formalities required by Portuguese law. The marriage is (possibly) not valid.

3. The circumstances are the same as in Illustration 2, except that *H* and *W* are married, not in a Portuguese Church, but at an English consulate in Lisbon, in accordance with the provisions of the Foreign Marriage Act, 1892. The marriage is (possibly) not valid (?)

4. *H* and *W*, British subjects domiciled in England, are first cousins; they are married at the British Embassy in Portugal, in accordance with the requirements of the Foreign Marriage Act, 1892. Their marriage is valid.<sup>5</sup>

RULE 173.—Subject to the exceptions hereinafter mentioned, no marriage is valid which does not comply,

<sup>1</sup> "It is . . . indispensable to the validity of a marriage that the *lex loci actus* be "satisfied so far as regards the capacity of the parties to contract it, whether in "respect of the prohibited degrees of affinity, or in respect of any other cause of "incapacity, absolute or relative." Westlake, s. 19 (4th ed. pp. 58, 59), citing *Serimshire v. Serimshire* (1752), 2 Hagg. Cons. 395; *Middleton v. Janverin* (1802), 2 Hagg. Cons. 437; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54. The weight due to Mr. Westlake's high authority necessitates the insertion of this Exception. Its soundness, however, is doubtful. The cases he cites are consistent with his doctrine, but do not necessitate its adoption.

<sup>2</sup> *In re Bozzelli's Settlement*, [1902] 1 Ch. 751.

<sup>3</sup> *I.e.*, in England.

<sup>4</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1.

<sup>5</sup> *I.e.*, in England. Compare *Sottomayor v. De Barros* (1879), 5 P. D. 94; *De Wilton v. Montefiore*, [1900] 2 Ch. 481.

Exception 3 has, it is submitted, no application to a case where the parties to a marriage can claim the benefit of extritoriality.

as to *both* (1) the capacity<sup>1</sup> of the parties, *and* (2) the form<sup>2</sup> of the marriage, with Rule 172.

### Comment and Illustrations.

#### (1) *Want of Capacity.*

Capacity to marry<sup>3</sup> depends upon the law of a person's domicile.

"It is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both, at the time of their marriage, subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised." <sup>4</sup>

"The learned judge,<sup>5</sup> [said Lord St. Leonards] . . . came to the conclusion, after an elaborate review of the authorities, that

<sup>1</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5; *Brook v. Brook* (1861), 9 H. L. C. 193, 234, 235.

<sup>2</sup> *Kent v. Burgess* (1840), 11 Sim. 361; *In re Estate of McLoughlin* (1878), 1 L. R. Ir. (Ch.) 421; *Lucan v. Higgins* (1822), 3 Stark. 178; *Butler v. Freeman* (1756), Amb. 301; *Swift v. Kelly* (1835), 3 Knapp, 257; Westlake, p. 57; Story, s. 113.

<sup>3</sup> See p. 534, *ante*.

<sup>4</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*. For criticism upon, which approaches to dissent from, the principle here laid down, see language of judgment in *Ogden v. Ogden*, [1908] P. (C. A.) 46, 73—76. The case itself decides nothing which is not consistent with the judgment in *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. See App., Note 24, "Case of *Ogden v. Ogden*."

<sup>5</sup> Sir Cresswell Cresswell.

“ a marriage contracted by the subjects of one country, in which  
 “ they are domiciled, in another country, is not to be held valid  
 “ if, by contracting it, the laws of their own country are violated.  
 “ This proposition is more extensive than the case before us  
 “ requires us to act upon, but I do not dissent from it.”<sup>1</sup>

The principle that legal capacity to marry depends upon a person's *lex domicilii* may be applied by our Courts either to marriages prohibited by English law and celebrated in a foreign country, or to marriages prohibited by a foreign law and celebrated in England.

*Marriages prohibited by English law.*—A marriage of a man with his deceased wife's niece, or with his own niece, when he is domiciled in England, is under this principle invalid wherever celebrated, though lawful in the country where it is celebrated and the niece is domiciled.<sup>2</sup> The grounds of such invalidity have been thus stated:—

“ It is quite obvious that no civilised State can allow its  
 “ domiciled subjects or citizens, by making a temporary visit to a  
 “ foreign country, to enter into a contract, to be performed in the  
 “ place of domicile, if the contract is forbidden by the law of the  
 “ place of domicile as contrary to religion or morality, or to any  
 “ of its fundamental institutions.

“ A marriage between a man and the [niece]<sup>3</sup> of his deceased  
 “ wife, being Danish subjects domiciled in Denmark, may be good  
 “ all over the world, and this might likewise be so, even if they  
 “ were native-born English subjects, who had abandoned their  
 “ English domicile, and were domiciled in Denmark. But I am by  
 “ no means prepared to say that the marriage now in question  
 “ ought to be, or would be, held valid in the Danish Courts, proof  
 “ being given that the parties were British subjects domiciled in  
 “ England at the time of the marriage, that England was to be  
 “ their matrimonial residence, and that by the law of England  
 “ such a marriage is prohibited as being contrary to the law of  
 “ God. The doctrine being established that the incidents of the  
 “ contract of marriage celebrated in a foreign country are to be  
 “ determined according to the law of the country in which the

<sup>1</sup> *Brook v. Brook* (1861), 9 H. L. C. 193, 234, 235, *per* Lord St. Leonards.

<sup>2</sup> See *DeWilton v. Montefiore*, [1900] 2 Ch. 481; *Brook v. Brook* (1861), 9 H. L. C. 193.

<sup>3</sup> The case from which this citation is made, and most of the others cited, have reference to marriage with a deceased wife's sister, which is now valid under English law. But they clearly apply to marriage between a domiciled Englishman and his deceased wife's, or his own niece.



“parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.”<sup>1</sup>

The principle that capacity to marry depends on the law of a person's domicile, has been applied by our Courts mainly to marriages with a deceased wife's sister which were invalid till the passing of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47), but will clearly be applied by them to any other marriage by a person domiciled in England which comes within the prohibited degrees<sup>2</sup> such as a marriage by a widow with her deceased husband's brother.<sup>3</sup>

*H* domiciled in England, but resident in New Zealand, marries there *W*, the widow of his deceased brother. Such marriage is lawful in New Zealand. The marriage is invalid in England.<sup>4</sup>

<sup>1</sup> *Brook v. Brook* (1861), 9 H. L. C. 193, 212, 213, *per* Campbell, C.

<sup>2</sup> *De Wilton v. Montefiore*, [1900] 2 Ch. 481.

<sup>3</sup> English Courts will, of course, hold invalid a marriage by any person who is prohibited from entering into it by English law. There is, further, no doubt that marriage between an uncle and his niece is prohibited by English law. The question, however, who are the persons to whom this prohibition is intended to apply admits of controversy, and in fact three different views may be taken as to the answer to be given to it.

*First.* The prohibition it may be thought applies to all persons whomsoever, whether British subjects or aliens. This is the natural view of those who hold that English law treats the marriage in question as strictly incestuous (*Brook v. Brook* (1861), 9 H. L. C. 193, 230, 234, language of Lord St. Leonards), but is hardly consistent with *In re Bozzelli's Settlement*, [1902] 1 Ch. 751.

*Secondly.* The prohibition may possibly be held to apply to all British subjects and to all persons domiciled in England. See *Mette v. Mette* (1859), 1 Sw. & Tr. 416; 28 L. J. (P. & M.) 117.

*Thirdly.* The prohibition may be considered to apply to all persons, whether British subjects or aliens, domiciled in England, and to such persons only. This seems to have been the view of the House of Lords when giving judgment in *Brook v. Brook* (1861), 9 H. L. C. 193 (see especially, language of Campbell, C., pp. 212, 213, and of Lord Cranworth, pp. 226—228). It is clearly now the view entertained both by the Courts (*De Wilton v. Montefiore*, [1900] 2 Ch. 481; *In re Bozzelli's Settlement*, [1900] 1 Ch. 751; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1), and by Parliament (see the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47); the New Zealand Deceased Husband's Brother's Act, 1900, No. 721).

Every Colonial Act receives, it must be remembered, directly or indirectly, the assent of the Crown, *i.e.*, in effect of the British Government, and that the veto of the Crown, *i.e.*, of the British Government, is, though rarely exercised in the case of Colonial legislation, a reality. It is therefore fair to argue that no marriage sanctioned by a Colonial Act is deemed incestuous by the British Government, or by the Parliament of the United Kingdom, as representing the people thereof. As to the veto of Colonial laws, see Dicey, *Law of the Constitution*, chap. ii.

<sup>4</sup> Compare *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; (1879), 5 P. D. 94. But see Exception 1, p. 633, *post*.

*H* domiciled and resident in New Zealand marries there *W*, the widow of his deceased brother. She is at the moment of the marriage domiciled in England. The marriage (*semble*) is invalid in England.<sup>1</sup>

*Marriages prohibited by foreign law.*—A marriage prohibited by the law of the country where both the parties are domiciled, and celebrated here, is, though legal by the ordinary rules of English law, invalid in England.

*H* and *W*, Portuguese subjects domiciled in Portugal, were first cousins, and on that account incapable by the law of Portugal of intermarrying with each other without the dispensation of the Pope. While residing in England, but not domiciled there, they were married according to the forms required by English law. The marriage was held invalid by our Courts.<sup>2</sup>

## (2) *Want of Form.*

No marriage is valid which, in respect of form, in the very wide sense given to the term "form" by English law,<sup>3</sup> does not fall within the terms of Rule 172.<sup>4</sup>

The following are examples of marriages which are invalid on account of not fulfilling the conditions as to form of Rule 172:—

In 1838,<sup>5</sup> *H* and *W*, English persons domiciled in England, are married at the English Church at Antwerp by a clergyman of the Church of England, in the presence of the English Consul. Formalities required in respect of residence and otherwise by Belgian law are omitted. The marriage is invalid.<sup>6</sup>

In 1833 *H* and *W*, Irish persons domiciled in Ireland, go in England through a ceremony of marriage celebrated by a Roman Catholic priest. The marriage is invalid.<sup>7</sup>

<sup>1</sup> Compare *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; (1879), 5 P. D. 94. But see Exception 1, p. 633, *post*.

<sup>2</sup> Though in the judgment of the Court stress is laid on the marriage being by Portuguese law "incestuous," and on the fact that the parties were Portuguese "subjects," these matters are almost certainly immaterial. The true *ratio decidendi* is, that "the question of personal capacity to enter into any contract is to be decided by the law of domicile." (*Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*.)

<sup>3</sup> See pp. 615—618, *ante*.

<sup>4</sup> See pp. 613 614, *ante*.

<sup>5</sup> And therefore prior to the Foreign Marriage Act; 1849 (12 & 13 Vict. c. 68).

<sup>6</sup> *Kent v. Burgess* (1840), 11 Sim. 361. Compare *Catherwood v. Caslon* (1844), 13 M. & W. 261; 13 L. J. Ex. 334.

<sup>7</sup> *In re Estate of McLoughlin* (1878), 1 L. R. Ir. (Ch.) 421. In each of the foregoing cases the marriage, but for its not conforming to the *lex loci contractus*, would be valid by the English common law.

*H* and *W*, persons domiciled in Scotland, marry in England by acknowledging themselves to be man and wife in the presence of third parties. The marriage is invalid.<sup>1</sup>

*H*, a Frenchman, marries *W*, an Englishwoman and British subject, at the chapel of the French Embassy, without complying with the requirements of English law as to banns, licence, &c. The marriage is invalid.<sup>2</sup>

*Exception*, 1.—The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign domicile is (possibly) not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England.<sup>3</sup>

#### Comment.

From the principle that capacity depends on the law of a person's domicile, it would seem to follow that the disability of either party,<sup>4</sup> under the law of his or her domicile, to contract a marriage with the other, invalidates the marriage. A suggestion has, however, been judicially made that the application of the principle should be limited, at any rate as regards marriages celebrated in England, to cases in which both of the parties are domiciled in a country by the laws of which they are incapable of intermarriage.

“Our opinion [that parties cannot make a valid marriage who are under an incapacity by their *lex domicilii*] . . . is confined to “*the case where both the contracting parties are, at the time of their “marriage, domiciled in a country the laws of which prohibit their “marriage.* All persons are legally bound to take notice of the “laws of the country where they are domiciled. No country is “bound to recognise the laws of a foreign State when they work “injustice to its own subjects, and this principle would prevent “the judgment in the present case being relied on as an authority “for setting aside a marriage between a foreigner and an English

<sup>1</sup> It would be held invalid in Scotland as well as in England. <sup>2</sup> Fraser, Husband and Wife (2nd ed.), 1309, 1310.

<sup>2</sup> Compare *Pertuis v. Tondear* (1790), 1 Hagg. Cons. 136.

<sup>3</sup> See *Sottomayor v. De Barros* (1879), 5 P. D. 94. The validity of this Exception, and the authority of *Sottomayor v. De Barros*, 5 P. D. 94, is open to doubt.

<sup>4</sup> See *Mette v. Mette* (1859), 1 Sw. & Tr. 416; 28 L. J. P. & M. 117.

"subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country."<sup>1</sup>

The suggested limitation has been acted upon in one case, and must, provisionally at least, be assumed, in spite of its illogical character, to be good law.

*H* and *W* are first cousins. *H* is domiciled in England. *W*, the woman, is domiciled in Portugal, and is, under the law of her Portuguese domicil, incapable of marrying *H*. They marry in England. The marriage (*semble*) is valid.<sup>2</sup>

*Exception 2.*<sup>3</sup>—A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicil of both or of either of the parties, is of a kind to which our Courts refuse recognition.

#### Comment and Illustration.

*H*, a negro, domiciled in a country where marriages between whites and negroes are prohibited, and *W*, a white woman, also there domiciled, come to England, and, without having acquired an English domicil, are married here. The marriage is valid.<sup>4</sup>

So the marriage of a monk or a nun would be held valid here, even though he or she might be incapable of marriage by the law of his or her domicil.<sup>5</sup>

<sup>1</sup> *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 6, 7, *per Curiam*.

Savigny, however, holds that an incapacity affecting a future wife according to the law of her domicil, but not affecting the future husband according to the law of his domicil, is immaterial. Hence, though he would approve of the decision in *Mette v. Mette*, he would hold that, if in that case the husband had been domiciled in Germany whilst the wife had been domiciled in England, the marriage ought to have been held valid by our Courts. See Savigny, s. 379, pp. 291, 292.

<sup>2</sup> *Sottomayor v. De Barros* (1879), 5 P. D. 94. See, however, Westlake's cogent criticism on the judgment in *Sottomayor v. De Barros* (1879), 5 P. D. 94; Westlake, pp. 59, 60. But contrast *Ogden v. Ogden*, [1908] P. (C. A.) 46.

<sup>3</sup> See Rule 125, p. 458, *ante*.

<sup>4</sup> "It has been decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the Federal Constitution." Cooley, *Constitutional Limitations* (6th ed.), 1890, p. 481, note 1.

<sup>5</sup> See Co. Litt. p. 136 a; 2 Co. Inst. p. 687. See as to the principle of this Exception, Intro., General Principle II. (B.), p. 34, *ante*, and Rule 125, p. 458, *ante*.

*Exception 3.*—Any marriage is valid which is made valid by Act of Parliament.<sup>1</sup>

**Comment.**

Acts are often passed rendering valid<sup>2</sup> marriages, or, rather, attempted marriages, which are invalid on account of the omission of some necessary formality. Such marriages are, of course, valid throughout the British dominions.<sup>3</sup> The necessary validity in England, at any rate as far as form is concerned, of marriages which comply with the requirements of the Foreign Marriage Act, 1892, is another application of this Exception.

(B) *ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE.*<sup>4</sup>

**RULE 174.**<sup>5</sup>—Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband and wife in respect of all movables

<sup>1</sup> See Intro., General Principle II. (A.), p. 34, *ante*, and Rule 147, p. 530, *ante*.

<sup>2</sup> See, for example, the Marriage Validation Act, 1888 (51 & 52 Vict. c. 28).

<sup>3</sup> *Question.*—Can a marriage be valid where the requirements of Rule 172, as to form, are of necessity neglected? (Compare pp. 621, 622, *ante*.)

*H* and *W*, an Englishman and an Englishwoman domiciled in England, are passengers on board a British ship. The ship is wrecked on a desert island. The crew and the passengers are saved, but have no means of leaving the island. *H* and *W* wish to marry. There is no local form of marriage to follow. There is no minister in holy orders among the shipwrecked persons. *H* and *W* marry *per verba de presenti*, in the presence of their companions. Is such a marriage valid? *Seemle*, it is not; the invalidity, however, arises wholly from the strict application of *Reg. v. Millis* (1844), 10 Cl. & F. 534. But for this case the marriage might be good at common law and valid; nor is it quite certain that in the absence of any possibility of compliance either with the local form or with the common law, the marriage might not be held valid within the principle suggested by *Ruding v. Smith* (1821), 2 Hagg. Cons. 371.

<sup>4</sup> Story, ss. 143—199; Foote (3rd ed.), pp. 331—339; Westlake (4th ed.), pp. 68—82; 35—38; Savigny, s. 379, pp. 292—298; Bar (Gillespie's transl.), pp. 405—427.

<sup>5</sup> Capacity to contract, at any rate as regards contracts connected with marriage, depends on the law of a person's domicile (see Rule 149, p. 534, *ante*). Hence the capacity of each one of the parties to an intended marriage to enter into a marriage contract (*i.e.*, execute a settlement before the marriage) depends upon the law of his or her respective domicile at the time of entering into the contract or executing the settlement. *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88, with which compare *Duncan v. Dixon* (1890), 44 Ch. D. 211; *Carter v. Silber*, [1892] 2 Ch. (C. A.) 278.

within its terms which are then acquired or are afterwards acquired.<sup>1</sup>

### Comment and Illustrations.

Parties to a marriage contract may regulate their mutual rights to property on whatever terms they think fit, and our Courts will, in general, enforce the terms which the parties have agreed upon. In 1803 *H* and *W*, British subjects domiciled in England, married in Paris. Their marriage contract stipulated that their rights over property should be regulated in accordance with French law. Under this law a wife has a power of making a will. It was held by our Courts that such a contract was to be enforced, and that the rights of the parties were the same that French subjects would have had under such a contract, and that, therefore, a will by the wife was valid.<sup>2</sup>

In 1846 *H*, a domiciled Englishman, marries *W*, a German domiciled in Prussia, at Cologne. Before marriage they enter into a marriage contract in the Prussian form. By Prussian law the effect of the contract is that *W* is entitled to all immovable and movable property belonging to her at the time of her marriage, and to all property which after her marriage accrues to her by donation or inheritance. Hence certain goods become under the contract the separate property of *W*. *H* becomes bankrupt in England. He holds such goods as trustee for *W*, and the goods, though in his possession, do not pass to his creditors.<sup>3</sup>

<sup>1</sup> Story, s. 143; *Feaubert v. Turst* (1702), Prec. Ch. 207; *Anstruther v. Adair* (1834), 2 My. & K. 513; *Williams v. Williams* (1841), 3 Beav. 547; *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705; *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265; *Bank of Scotland v. Guthbert* (1813), 1 Rose, 481; *Watts v. Shrimpton* (1856), 21 Beav. 97; *McCormick v. Garnett* (1854), 5 De G. M. & G. 278; *Van Grutten v. Digby* (1862), 31 Beav. 561, 32 L. J. Ch. 179; *Byam v. Byam* (1834), 19 Beav. 58. The clause against anticipation annexed to a gift to an Englishwoman whose husband is domiciled in a foreign country is valid, and cannot be got rid of even though by the law of the country where the husband is domiciled it is invalid. *Peillon v. Brookings* (1858), 25 Beav. 218.

<sup>2</sup> *Este v. Smyth* (1854), 18 Beav. 112. The form of the marriage contract or settlement ought, it would seem, to depend on the law of the place where it is made. (See Rule 150, p. 540, *ante*.) Our Courts, however, at any rate when one of the parties to a marriage contract is a British subject and the property dealt with is in England, show a strong inclination not to hold it invalid on account of merely formal invalidity under the *lex loci contractus*. (See Exception 3, p. 543, *ante*, to Rule 150; *Van Grutten v. Digby* (1862), 32 L. J. Ch. 179; 31 Beav. 561.)

<sup>3</sup> *Ex parte Sibeth* (1885), 14 Q. B. D. 417.

SUB-RULE 1.<sup>1</sup>—The marriage contract or settlement will be construed with reference to the proper law of the contract,<sup>2</sup> *i.e.*, in the absence of reason to the contrary, with reference to the law of the matrimonial domicile.<sup>3</sup>

#### Comment and Illustration.

“It appears to be a well settled principle of law in relation to contracts, regulating the rights of property consequent upon marriage, as far at least as personal property is concerned, that, if the parties marry with reference to the laws of a particular place or country as their future domicile, the law of that place or country is to govern as the place where the contract is to be carried into full effect.”<sup>4</sup>

*H* and *W*, persons domiciled in Scotland, marry in London. A marriage contract or settlement is made between them in the Scotch form. *H* and *W* afterwards become domiciled in England. The rights of the parties are nevertheless to be decided with reference to Scotch law; for “this contract, though prepared in England and a valid English contract, is to be governed by the Scotch law, and the construction and operation of it must be the same whether in or out of Scotland.”<sup>5</sup>

SUB-RULE 2.—The parties may make it part of the contract or settlement that their rights shall be subject to

<sup>1</sup> This and the following Sub-Rules are in reality applications of the general principle embodied in Rule 152, *ante*, that the interpretation of a contract is determined in accordance with the law by which the parties may be presumed to have intended that it should be governed. See Rule 146, p. 529, *ante*.

<sup>2</sup> For meaning of “proper law of a contract,” see Rule 146, p. 529, *ante*.

<sup>3</sup> See *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265; *Byam v. Byam* (1854), 19 Beav. 58; *Colliss v. Hector* (1875), L. R. 19 Eq. 334; *Chamberlain v. Napier* (1880), 15 Ch. D. 614; *Anstruther v. Adair* (1834), 2 My. & K. 513; *Le Breton v. Miles*, 8 Paige, 261 (Am.); 1 Bishop, Law of Marriage and Divorce (5th ed.), s. 404. “The decisions of the English tribunals establish . . . that where there is an express contract it is governed, as to its construction, by the law of the matrimonial domicile.” Phillimore, s. 466.

For meaning of “matrimonial domicile,” see Exception 2 to Rule 141, p. 511, *ante*.

<sup>4</sup> *Le Breton v. Miles*, 8 Paige, 261, 265, *per Curiam*. This statement of the law, though extracted from an American case, may be taken as representing the doctrine of English Courts as regards movable property.

<sup>5</sup> *Duncan v. Cannan* (1854), 23 L. J. Ch. 265, 273, *per Romilly*, M. R.

some other law than the law of the matrimonial domicile, in which case their rights will be determined with reference to such other law.<sup>1</sup>

### Illustrations.

1. *H* and *W*, domiciled in England, make it part of their marriage contract that their rights shall be regulated in accordance with the law of France. Our Courts will, as far as possible, give effect to the contract in accordance with French law.<sup>1</sup>

2. *H*, an Englishman domiciled in England, marries *W*, a Scotchwoman domiciled in Scotland. They enter into a marriage settlement in Scottish form, under which *H* acquires a life interest in property of *W*. It is part of the settlement that all payments to *H* in respect of this interest "shall be strictly alimentary, and "shall not be assignable nor liable to arrestment or any other "legal diligence at the instance of his creditors." *H* continues during life domiciled in England, and mortgages his life interest under the settlement to English creditors. Though the matrimonial domicile was English, the construction and the effect of the contract depends upon Scotch law, and the mortgage of *H*'s life interest to creditors is invalid.<sup>2</sup>

SUB-RULE 3.—The law of the matrimonial domicile will, in general, decide whether any particular movable (*e.g.*, any future acquisition) is included within the terms of the marriage contract or settlement.

### Comment.

The law with reference to which the marriage contract or settlement is construed, which is in general the law of the matrimonial domicile, must, it is conceived, as far as the question is a matter of law, determine whether any particular class of movable property, *e.g.*, goods and chattels acquired after the marriage, are included within the terms of the contract.

<sup>1</sup> *Este v. Smyth* (1854), 23 L. J. Ch. 705; 18 Beav. 112; *Duncan v. Cannon* (1854), 18 Beav. 128; *Chamberlain v. Napier* (1880), 15 Ch. D. 614. The same result would follow if it could be fairly inferred from the terms of the contract that the intention of the parties (though not expressed in so many words) was that it should be construed with reference to French law.

<sup>2</sup> *In re Fitzgerald*, [1904] 1 Ch. (C. A.) 573.



Property not included within the terms of the contract will be regulated by the rules applicable to cases where there is no marriage contract.<sup>1</sup>

SUB-RULE 4.—The effect or construction of the marriage contract or settlement is not varied by a subsequent change of domicil.<sup>2</sup>

#### Comment.

The effect of a contract must depend on the intention of the parties at the time of making it. A marriage contract or settlement must, therefore, be construed with reference to the law, whatever it was, which the parties had in view when the contract was made, *i.e.*, in general the law of the matrimonial domicil at the time of the marriage. No later change of domicil can affect its meaning.

RULE 175.<sup>3</sup>—Where there is no marriage contract or settlement the mutual rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicil,<sup>4</sup> without reference to—

- (1) The law of the country where the marriage is celebrated,<sup>5</sup> or where the wife is domiciled before marriage;<sup>5</sup> or
- (2) Any subsequent change of domicil or nationality on the part of the parties to the marriage.<sup>6</sup>

<sup>1</sup> See Rule 175; *Hoare v. Hornby* (1843), 2 Y. & C. 121; *Anstruther v. Adam* (1834), 2 My. & K. 513; *In re Simpson*, [1904] 1 Ch. (C. A.) 1; *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265; Phillimore, s. 476.

<sup>2</sup> See *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265.

<sup>3</sup> *De Nicols v. Curlier*, [1900] A. C. 21; *In re De Nicols*, [1900] 2 Ch. 410.

<sup>4</sup> For the meaning of the term "matrimonial domicil," see pp. 510—512, *ante*.

<sup>5</sup> In the absence of express contract, the law of the matrimonial domicil "regulates the rights of the husband and wife in the movable property belonging to either of them at the time of the marriage, or acquired by either of them during the marriage. By the matrimonial domicil is to be understood that of the husband at the date of the marriage, with a possible exception in favour of any other which may have been acquired immediately after the marriage, in pursuance of an agreement to that effect made before it." Westlake, s. 36, p. 71.

<sup>6</sup> *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211.

<sup>7</sup> *De Nicols v. Curlier*, [1900] A. C. 21; *In re De Nicols*, [1900] 2 Ch. 410; and compare *Welch v. Tennent*, [1891] A. C. 639, 644, 645.

## Comment.

The effect of this Rule is that the mutual rights of husband and wife to each other's movables are governed entirely by the law of the actual (or, possibly, of the intended) domicile of the husband at the time of the marriage. It may now be considered—to a great extent, at any rate—as well established.<sup>1</sup>

The principle<sup>2</sup> on which the Rule apparently rests is that, as regards movable property,<sup>3</sup> there arises, in the absence of any express marriage contract or settlement, a tacit or implied contract between the parties to the marriage that their mutual property rights shall thenceforward be governed by the law of the country where the husband is domiciled at the date of the marriage, or, more accurately, by the law of the matrimonial domicile.<sup>4</sup>

Hence, too, the result that none of the circumstances enumerated in clauses (1) and (2) of Rule 175 affect the mutual rights over movables of the parties to a marriage. The effect of a marriage contract or settlement, whether express or tacit, cannot be varied by any subsequent event, such, for example, as the acquisition of a domicile other than the matrimonial domicile. “If [it has been judicially laid down] there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile. Why should the obligation of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country [France] where the marriage was celebrated to an express contract, lose their force and effect when the parties

<sup>1</sup> *De Nicols v. Curlier*, [1900] A. C. 21.

<sup>2</sup> Note especially language of Lord Macnaghten in *De Nicols v. Curlier*, [1900] A. C. at pp. 32–34. Prior to the decision of this case the admission by English Courts of this principle was fairly open to dispute. *Lashley v. Hog* (1804), 4 Paton, 581; Story, s. 187.

<sup>3</sup> And probably, it may be added, as regards English immovable property. See pp. 512–514, *ante*.

<sup>4</sup> Story, ss. 158, 159, appears to suggest that the effect of a marriage on property depends on the law of the place where the marriage is celebrated. This view, which is not countenanced by other writers, is hardly consistent with the language which he uses in sects. 186, 187. The expressions employed in sects. 158, 159 refer, it may be assumed, to cases in which the place where the marriage is celebrated is also the place of the matrimonial domicile. But see, as to rights of succession, Rule 176, p. 643, *post*; and Westlake, p. 81, s. 42.

"become domiciled in another country? . . . Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicile the husband has £10,000 of his own. Why should his ownership of that sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time."<sup>1</sup>

Our Rule certainly applies to marriages made by parties domiciled in countries—such as France—where the parties to a marriage have a distinct choice as to the system which shall determine their mutual property rights.<sup>2</sup> It almost certainly applies to marriages in countries—such as England—where, in the absence of a settlement, the law does not supply any such formal choice of the systems which are to govern the property rights of husband and wife.<sup>3</sup>

Recent cases exhibit a marked tendency on the part of our judges towards the establishment of the one general principle that, in the absence of a marriage contract or settlement, the mutual rights of husband and wife, not only over movables,<sup>4</sup> but also over immovables,<sup>5</sup> ought to be governed by the law of the matrimonial domicile, that is, by the proper law of the contract into which the parties enter at the time of the marriage. This principle comes very near to the doctrine taught by Savigny,<sup>6</sup> and in substance, though not exactly in form, accepted by many foreign jurists.<sup>7</sup> It has not, however, we must admit, been as yet fully accepted by English judges.

<sup>1</sup> *De Nicols v. Curlier*, [1900] A. C. 21, 33, judgment of Lord Macnaghten.

<sup>2</sup> See Illustrations 1—3, p. 642, *post*.

<sup>3</sup> See Illustrations 4—7, pp. 642, 643, *post*.

<sup>4</sup> See p. 639, *ante*.

<sup>5</sup> See pp. 512—514, *ante*.

<sup>6</sup> Savigny, s. 379, pp. 294—301.

<sup>7</sup> Conf. Bar (Gillespie's transl., 2nd ed.), pp. 408, 414, 422, 423. See, further, Appendix, Note 23, "Effect of the De Nicols Cases."

## Illustrations.

1. *H*, a French citizen domiciled in France, marries at Paris *W*, a Frenchwoman, also domiciled in France. They are married without any express contract or settlement, so that, according to French law, their rights *inter se* as to property are subject to the system of community of goods.<sup>1</sup> They come to England and obtain an English domicil. *H* becomes a naturalized British subject. Afterwards *H* amasses in England a large amount of movable property. He dies domiciled in England, having made an English will, by which he purports to dispose of all such property in favour of *N*. *W* survives him. *W*, under the law of France as to the community of goods, has a right to half of the movable property acquired by *H*. Her rights are not affected by the change of domicil and nationality. She is entitled to the share of the movables to which she would have been entitled if *H* and *W* had remained domiciled in France, *i.e.*, the rights of *H* and *W* respectively over the movable property are governed by the law of their matrimonial domicil (France).<sup>2</sup>

2. The circumstances are the same as in Illustration 1, except that the marriage between *H* and *W* takes place in England. The rights of *H* and *W* respectively to movables are governed by the law of the matrimonial domicil (France).

3. *H*, domiciled in France, marries *W*, a woman domiciled in England. The marriage takes place in London. The rights of *H* over the movables of *W*, and of *W* over the movables of *H*, respectively, are governed by the law of France.

4. *H*, domiciled in England, marries in London *W*, a Frenchwoman domiciled in France. The rights of the parties to movables are governed by the law of England, just as they would be if *H* and *W* were both domiciled in England.<sup>3</sup>

5. *H*, domiciled in England, marries in Switzerland *W*, a Frenchwoman domiciled in Italy. The rights of the parties to movable property are governed by the law of England.

6. *H*, domiciled in England, marries in France *W*, a French-

<sup>1</sup> See Code Civil, tit. v. Arts. 1401—1496, "Of Marriage Contracts and the respective Rights of the Spouses."

<sup>2</sup> *De Nicols v. Curlier*, [1900] A. C. 21.

<sup>3</sup> *I.e.*, *W*'s rights are governed (assuming the marriage to take place after 1st January, 1883) by the Married Women's Property Act, 1882, and the Acts amending the same.

woman. *W* after her marriage inherits £1,000. The right to the money is governed by the law of England.

7. *H*, domiciled in England, marries *W*, a woman domiciled in France. It is the intention of both parties to go, immediately after the marriage, and settle in Scotland. This intention they forthwith carry out. Their rights over movables are governed by Scotch law (?).<sup>1</sup>

RULE 176.<sup>2</sup>—The mutual rights of husband and wife in respect of succession to movables on the death of the other are, in so far as they are not determined by any marriage contract or settlement, governed by the law of the deceased's domicile at the time of his or her death.

#### Comment and Illustration.

As the wife's domicile is legally that of her husband, this Rule amounts in fact to saying that the right to succession between the parties will depend in every case upon the domicile of the husband at the time when the death (in respect of which succession is claimed) takes place. If the husband dies first, the domicile to be looked to is his domicile at the time of his own death. If the wife dies first, the domicile in question is that of the husband at the time of her death. This Rule applies, of course, only in so far as is consistent with the terms of any marriage contract or settlement.

It is a matter of practical difficulty to determine the limits of Rule 175 and Rule 176 respectively.<sup>3</sup> *H* and *W* are French citizens domiciled in France, who marry in France, and whose matrimonial domicile is therefore French. They afterwards acquire an English domicile, and *H* dies domiciled in England. It is clear that French law determines, as far as the movable property of *H* and *W* at the time of *H*'s death is concerned, how much of such property is the property of *H* and how much of *W*.<sup>4</sup> If, however,

<sup>1</sup> See p. 511, *ante*.

<sup>2</sup> See Westlake, p. 81, s. 42; Savigny, s. 379, p. 298.

<sup>3</sup> "Intestate succession between spouses is regulated, as between strangers, by the last domicile of the deceased. In many cases, however, it may be doubtful whether the claim to the inheritance is to be deduced from the rules of proper intestate succession, or from the mere continuance of the relations as to conjugal property which subsisted during the marriage (*communio bonorum*). In the first case the last domicile determines; in the second case the domicile at which the marriage began." Savigny (Guthrie's transl., 2nd ed.), p. 298.

<sup>4</sup> *De Nicols v. Curtier*, [1900] A. C. 21.

a question arises whether *W* (*e.g.*, in the case of *H* dying intestate) succeeds to any part of what was *H*'s own property, the reply to the inquiry must be sought for in the law of England (the law of *H*'s domicile at the time of his death), and not in the law of France (the law of the matrimonial domicile).<sup>1</sup>

<sup>1</sup> See *De Nicols v. Curlier*, [1900] A. C. 21, and note that the reason why the House of Lords did not hold itself bound by the judgment of the House in *Lashley v. Hog* (1804), 4 Paton, 581, was that that case, in their Lordships' opinion, referred to a right of succession.

## CHAPTER XXVIII.

TORTS.<sup>1</sup>

RULE 177.<sup>2</sup>—Whether an act done in a foreign country is or is not a tort (*i.e.*, a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*).

## Comment.

This Rule lays down the principle of which the effect is worked out in Rule 178 and Rule 179.<sup>3</sup>

RULE 178.<sup>4</sup>—An act done in a foreign country is a tort, and actionable as such in England, if it is *both*

- (1) wrongful, *i.e.*, not justifiable, according to the law of the foreign country where it was done, *and*,
- (2) wrongful, *i.e.*, actionable as a tort, according to English law, *i.e.*, is an act which, if done in England, would be a tort.<sup>5</sup>

<sup>1</sup> Westlake, chap. xi., pp. 257—270; Foote, pp. 487—503; Nelson, pp. 286—293; Story, ss. 307 d, 307 e; Wharton, ss. 474—481; Savigny (Guthrie's transl. (2nd ed.)), s. 374, pp. 253—256; Bar (Gillespie's transl. (2nd ed.)), ss. 286, 287, pp. 634—642.

<sup>2</sup> See Intro., p. 38, *ante*; and see Rule 178 and Rule 179, p. 647, *post*; *Chartered Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 536, 537, judgment of Brett, L. J. Compare *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. (Ex. Ch.) 1, 28, 29, judgment of the Court, delivered by Willes, J.

<sup>3</sup> It may to a great extent be treated as a result of General Principle No. I. (Intro., p. 23, *ante*), combined with General Principle No. II. (B.). (Intro., p. 34, *ante*.)

<sup>4</sup> *Scott v. Seymour* (1862), 1 H. & C. 219 (Ex. Ch.); 32 L. J. Ex. 61.

<sup>5</sup> But note that no action can be brought in England for any injury to foreign land, unless the action is in reality one not for trespass to the land but for a breach of contract either express or implied, in regard to the land, *e.g.*, an implied agreement by a tenant of foreign land, under the law of the foreign country, that he will be liable for damage done to the land through his negligence. Conf. as to implied contract with regard to land, *In re De Nicols*, [1900] 2 Ch. 410. See Rule 39, p. 201, *ante*; *British S. Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, reversing judgment of Court of Appeal, [1892] 2 Q. B. (C. A.) 358.

### Comment.

The word "wrongful," it should be noted, bears a somewhat different sense in the two clauses of this Rule. In clause (1) it means an act which is not innocent or excusable, or in other words, which is either actionable or punishable according to the law of the country, *e.g.*, Italy, where it was done; in clause (2) it means an act which, if done in England, would, according to the law of England, be actionable.

Clause (1) is to a great extent an application of the principle enjoining the recognition of rights acquired under the law of any civilised country,<sup>1</sup> and gives to *A* a *prima facie* right to bring in England an action for damages against *X* for any wrongful act on the part of *X*, *e.g.*, an assault from which *A* has suffered in Italy, and which is actionable under Italian law. But the clause goes further than is absolutely required by that principle,<sup>1</sup> and opens the possibility of *A* having the right to recover damages from *X* in England for some act which, though wrongful under the law of Italy, does not under that law give *A* a right of action against *X*. Clause (2) makes the right to bring an action in England for a wrong committed in a foreign country dependent upon the fact that the act complained of would, if done in England, be a tort under English law. Rule 178 is, however, simply affirmative: it derives most of its importance from its connection with Rule 179.

### Illustrations.

1. *X*, a British subject, commits what, according to English law, is an assault on *A*, a British subject, at Naples, where the act is wrongful, and damages for it are recoverable by proper proceedings. The assault is a tort.<sup>2</sup>

2. *X*, an Italian subject, commits what, according to English law, is an assault on *A*, an Italian subject, at Naples, where the act is wrongful, and damages for it are recoverable by proper proceedings. The assault is a tort.

3. *X* publishes at Paris a statement about *A* which, according to English law, is a libel. The publication is wrongful and actionable according to the law of France. The publication is a tort.

4. *X* publishes in a foreign country statements of *A* which would, if published in England, have entitled *A* to maintain an action

<sup>1</sup> See General Principle No. I., p. 23, *ante*, and compare pp. 37, 38, *ante*.

<sup>2</sup> *Scott v. Seymour* (1862), 1 H. & C. 219, 231 (Ex. Ch.); 32 L. J. Ex. 61.



for libel against *X*. Under the law of such foreign country the publication of these statements is wrongful, *i.e.*, is not justifiable or innocent, but would not be the subject of civil proceedings in such country. The publication of such statements is a tort for which *A* can maintain an action against *X* in England.<sup>1</sup>

RULE 179.—An act done in a foreign country is not a tort, or actionable as such, in England if it *either*—

- (1), is innocent, *i.e.*, justifiable, according to the law of the country where it was done,<sup>2</sup> or
- (2) is an act which, if done in England, would not be actionable as a tort.<sup>3</sup>

#### Comment.

Clause (1) must probably be treated as an application of the general principle that an English Court will not enforce any right which involves interference with the authority of a foreign sovereign within the country whereof he is sovereign. To treat an act done, *e.g.*, in Italy, which by the law of Italy is absolutely innocent or justifiable, as a tort, would clearly be an interference with the authority of the Italian sovereign.<sup>4</sup>

“The rule which obtains in respect of property and civil contracts—namely, that an act, unless intended to take effect elsewhere, shall, as regards its effect and incidents, if a conflict of law arises between the *lex loci* and the *lex fori*, be governed by the former—appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to that comity of nations in matters of law to which effect should, if possible, be given. An act might not only be lawful, but might even be enjoined by the law of another country, which would be wrongful, and give a right of action by our law, and it certainly would be in the

<sup>1</sup> *Machado v. Fontes*, [1897] 2 Q. B. (C. A.) 231.

<sup>2</sup> *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. (Ex. Ch.) 1; *Dobree v. Napier* (1836), 2 Bing. N. C. 781; *R. v. Lesley* (1860), 1 Bell, Cro. Cas. 220; 29 L. J. M. C. 97.

<sup>3</sup> *The Halley* (1868), L. R. 2 P. C. 193. See as to the ground of the Rule, Intro., pp. 37, 38, *ante*.

<sup>4</sup> See Intro., General Principle No. II. (C.), p. 34, *ante*, and p. 38, *ante*.

“ highest degree unjust that an individual who has intended to obey the law binding upon him should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justified by the law of a foreign country under circumstances in which it would be actionable here. It would be impossible to hold that in such a case an action could be maintained in an English Court.”<sup>1</sup>

Clause (2) may be thus explained: The theoretical ground for the refusal of English Courts to entertain an action for an act not tortious under English law is the objection to giving damages, or in effect punishing a proceeding which English law does not condemn.<sup>2</sup>

The general effect of Rules 178 and 179 taken together, has been thus authoritatively stated:—

“ In order to maintain an action here on the ground of a tort committed [in a foreign country<sup>3</sup>], the act complained of must be wrongful—I use the word ‘wrongful’ deliberately—both by the law of this country, and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with. In the case of *Phillips v. Eyre*,<sup>4</sup> Willes, J., lays down very distinctly what the requisites are in order to found such an action. He says this: ‘As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled:—First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.’ Then in *The M. Moxham*,<sup>5</sup> James, L. J., in the course of his judgment, uses these words<sup>6</sup>:— ‘It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimised by a subsequent act of the legislature, then this Court will take into consideration that state of the law—that is to say, if by the law of the foreign country a particular person is justified, or is

<sup>1</sup> *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225, 239, judgment of Cockburn, C. J.

<sup>2</sup> See Intro., General Principle No. II. (B.), p. 34, *ante*.

<sup>3</sup> These words are substituted for “outside the jurisdiction.”

<sup>4</sup> L. R. 6 Q. B. 1.

<sup>5</sup> 1 P. D. 107.

<sup>6</sup> *Ibid.*, at p. 111.

"excused, or has been justified or excused for the thing done, he will not be answerable here." <sup>1</sup>

"I think there is no doubt at all that an action for [*e.g.*] a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published. . . . We start then from this: That the act in question is *prima facie* actionable here,<sup>2</sup> and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorised, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give." <sup>3</sup>

Hence the question which was once debatable, whether an action could be maintained in England for any act done in a foreign country, unless it is strictly *actionable*, may now be considered to have received its answer. An action is maintainable in England for any act done in a foreign country which would have been a tort if done in England, and is neither innocent, justifiable, nor authorised by the law of the country where the act is done.

One or two questions still require consideration.

*First Question.*—Does anything depend upon the answer to the inquiry whether the wrongdoer and the person wronged both or either of them are British subjects?

This inquiry must be answered in the negative.

"If, indeed," says Blackburn, J., with regard to a particular case, "the plea had averred that by the law of Naples no damages are recoverable for an assault, however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar, but, supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that, when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners. The point, however, is not now raised, and it is unnecessary to express any opinion upon it." <sup>4</sup>

<sup>1</sup> *Machado v. Fontes*, [1897] 2 Q. B. (C. A.) 231, 233, judgment of Lopes, L. J. Compare pp. 234, 235, judgment of Rigby, L. J.

<sup>2</sup> *I.e.*, would be a tort if done in England.

<sup>3</sup> *Machado v. Fontes*, [1897] 2 Q. B. (C. A.) 231, 235, 236, judgment of Rigby, L. J.

<sup>4</sup> *Scott v. Seymour* (1862), 1 H. & C. 219, 237, judgment of Blackburn, J.

This opinion of Lord Blackburn is hesitatingly expressed, but is, it is submitted, clearly sound, and is in part confirmed by a later decision.<sup>1</sup> It may (if confined to acts done in a civilised country) be accepted to its fullest extent. The civil rights and liabilities of the parties before an English Court are, subject to the rarest exceptions, not affected by their nationality.

*Second Question.*—How far is an act, wrongful by English law, actionable if committed beyond the limits of a civilised country?

This question applies either to acts done in a country which is not civilised or to acts done on the high seas.

*As to acts done in an uncivilised country.*—With this matter these Rules are not concerned.<sup>2</sup> For the statement of such conclusions with regard to it as English cases apparently warrant, readers are referred to the Appendix.<sup>3</sup>

*As to acts done on the high seas.*—An act done on board a ship on the high seas must be treated as an act done in the country to which the ship belongs, *e.g.*, England, France, or Italy. We are, therefore, here concerned solely with the law applicable to collisions at sea.<sup>4</sup> There certainly is some ground for the assertion that collisions at sea, even though both or either of the ships should happen to be foreign ships, since they take place outside the territorial jurisdiction of any State, are in an English Court to be treated as governed by English law; and it is the opinion of Brett, L. J., that “an action for a tort committed on the high seas between two foreign ships . . . can be maintained in this country although it is not a tort according to the laws of the Courts in that foreign country;”<sup>5</sup> and therefore, in a case where both the ships in collision were Dutch ships, and English plaintiffs brought an action for damage done to their goods, by negligence of one of the ships, it has been laid down by Brett, L. J., that, “as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country, but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not, indeed, by the common law of Eng-

<sup>1</sup> *Machado v. Fontes*, [1897] 2 Q. B. (C. A.) 231.

<sup>2</sup> See Intro., pp. 30, 31, *ante*.

<sup>3</sup> See App., Note 2, “Law governing Acts done in Uncivilised Countries.”

<sup>4</sup> Foote, pp. 494—499; Westlake, pp. 262—269.

<sup>5</sup> *Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 537, *per* Brett, L. J.; *Submarine Telegraph Co. v. Dickson* (1864), 15 C. B. N. S. 759; 33 L. J. C. P. 139.

“land, but by the maritime law, which is part of the common law of England as administered in this country.”<sup>1</sup>

Prior to 1862, difficult and doubtful questions were raised as to the law relating to collisions between an English and a foreign ship, or between foreign ships on the high seas, or in foreign or in English waters. But it is now unnecessary to discuss them at length, since they were set at rest by the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), which, though repealed, has, as regards this matter, been re-enacted in substance by the Merchant Shipping Act, 1894.<sup>2</sup>

The following points may be noted :—

1. The limitation of liability under the Merchant Shipping Act, 1894, and the rule as to damages for collision contained in the Judicature Act, 1873, s. 25, sub-s. 9, apply to any ship, whether British or foreign, either on the high seas or in British territorial waters.<sup>3</sup>

Thus, a collision takes place in the Mediterranean between an English and a Belgian ship, whereby the latter and her cargo are sunk. In an action against the English ship, the liability of the owner is limited by the provisions of the Merchant Shipping Act, 1894, s. 503,<sup>4</sup> and, if the wrongdoer had been the Belgian ship, the liability of the owner would, in an action against the Belgian ship, have been equally limited.

2. In case of a collision in British territorial waters or, apparently, on the high seas, the owner of a foreign ship cannot avail himself of any exemption from,<sup>5</sup> or limitation on,<sup>5</sup> his liability for damage which is conferred upon him by the law of the ship's flag.

<sup>1</sup> See Note 5, p. 650, *ante*.

<sup>2</sup> See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503.

<sup>3</sup> *The Amalia* (1863), 1 Moore, P. C. N. S. 471, 474, 475, judgment of Dr. Lushington. Compare, as to the state of the law under the Merchant Shipping Act, 1854, *Cope v. Doherty* (1858), 4 K. & J. 367; 2 De G. & J. 614; *The Wild Ranger* (1862), Lush. 553; *General Iron Screw Co. v. Schurmanns* (1860), 1 J. & H. 180.

<sup>4</sup> *The Amalia* (1863), 1 Moore, P. C. N. S. 471. The Merchant Shipping Act, 1894, s. 503, re-enacts in substance the Merchant Shipping Act, 1862, s. 54, under which this case is decided.

<sup>5</sup> *The Leon* (1881), 6 P. D. 148; *Chartered Mercantile Bank of India v. Netherlands, & Co.* (1883), 10 Q. B. D. (C. A.) 521, 537, 544; *The Wild Ranger* (1862), Lush. 553; *The Zollverein* (1856), Swabey, 96. See Foote (3rd ed.), pp. 497, 498; but contrast Westlake (4th ed.), pp. 264, 265, ss. 202, 202A, and p. 267. Mr. Westlake appears to incline to the opinion that the liability of a foreign shipowner depends on the law of the flag.

A Spanish ship comes into collision with, and causes damage to, a British ship on the high seas. *X*, the owner of the Spanish ship, is a Spanish subject, and is, by the special circumstances under which the collision takes place, exempted by Spanish law from liability. The exemption does not free him<sup>1</sup> from liability.<sup>2</sup>

A Spanish ship comes into collision with, and causes damage to, a French ship on the high seas. *X*, the owner, is a Spanish subject, and is, under the special circumstances of the case, exempted by Spanish law from liability. *Semble*, the exemption does not free him from liability.<sup>3</sup>

*Third Question.*—Do Rules 177 to 179 apply to an action grounded, not on a tort or wrong in the strict sense of that term, committed in a foreign country, but upon the breach in such country of a quasi-contract existing under the law of such country?

The reply must (*semble*) be in the negative. *X* may be sued in England for the breach in a foreign country of a quasi-contract existing under the law thereof, though no such quasi-contract is known to the law of England.<sup>4</sup> But it may often be a difficult matter to determine whether an action brought in respect of an act done in a foreign country is in truth grounded upon a tort or upon the breach of a quasi-contract existing under the law of such country.

### Illustrations.

1. *X*, a British subject, seizes in Portugal the goods of *A*, a British subject, under circumstances which make the seizure lawful according to Portuguese law, though the seizure would have been wrongful if it had taken place in England. The seizure is not a tort.<sup>5</sup>

2. *X* imprisons *A* in Jamaica under circumstances which, if the act had been done in England, would have rendered *X* liable

<sup>1</sup> *I.e.*, in proceedings in an English Court.

<sup>2</sup> *The Leon* (1881), 6 P. D. 148.

<sup>3</sup> *Conf. Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 537, judgment of Brett, L. J.

<sup>4</sup> *Batthyany v. Walford* (1887), 36 Ch. D. (C. A.) 269.

<sup>5</sup> *I.e.*, is not actionable in England. Compare *Dobree v. Napier* (1836), 2 Bing. N. C. 781; *Blad's Case* (1673), 3 Swanst. 603, and *Blad v. Bamfield* (1674), 3 Swanst. 604; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 29, judgment of Willes, J.

to an action for false imprisonment. The imprisonment is not wrongful according to the law of Jamaica. It is not a tort.<sup>1</sup>

3. A British ship, through negligence of the master and crew, comes into collision with and damages a boat of *A*'s in a foreign harbour. *X* is the owner of the British ship. Under the law of the foreign country he is not liable for damage caused by the negligence of the master and crew of his ship. *X* has not committed a tort.<sup>2</sup>

4. The *Halley*, a British ship, of which *X*, a British subject, is owner, comes into collision with and damages, when in Belgian waters, the ship of *A*. The damage is caused through the negligence of *N*, a pilot, whom *X*, by Belgian law, is compelled to employ. *X* is, under Belgian law, liable to an action for the damage done to *A*'s ship; under English law *X* is, on the ground of his employing *N*, protected from liability. *X*'s act is not a tort.<sup>3</sup>

5. *X* publishes in writing in a foreign country a false and defamatory statement concerning *A*'s deceased father, for which *X* is, under the law of such foreign country, liable to an action for damages. The statement would not render *X* liable to an action if published in England.<sup>4</sup> *X* has not committed a tort.

6. *D*, the possessor of Austrian entailed estates, died domiciled in England, and leaving property in England. By the law of Austria such possessor of entailed estates is under an obligation to hand over or pass the property at his death to his successor in as good a condition as when he received it, and his representative is bound, after the deceased's death, to make good deterioration which has taken place during the deceased's possession. The entailed estates have suffered deterioration whilst in the possession of *D*. *X* is *D*'s executor. *A*, the successor, can maintain an action against *X* for the amount due in respect of the deterioration of the estates, *i.e.*, for a breach of the quasi-contract on the part of *D*.<sup>5</sup>

SUB-RULE.—An act done in a foreign country which, though wrongful under the law of that country at the

<sup>1</sup> See *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1. Conf. *Reg. v. Lesley* (1860), 1 Bell, Cro. Cas. 220; 29 L. J. M. C. 97.

<sup>2</sup> Compare *The Moxham* (1875), 1 P. D. 43.

<sup>3</sup> *The Halley* (1868), L. R. 2 P. C. 193.

<sup>4</sup> See *Rez v. Topham* (1791), 4 T. R. 126; *Reg. v. Labouchere* (1884), 12 Q. B. D. 320.

<sup>5</sup> *Batthyany v. Walford* (1887), 36 Ch. D. (C. A.) 269.

moment when it was done, has since that time been the subject of an Act of Indemnity passed by the legislature of such country, is not a tort.<sup>1</sup>

#### Illustration.

X assaults and imprisons A in Jamaica. At the time of the assault, X's act is wrongful both by the law of Jamaica and by the law of England. The assault takes place for the purpose of suppressing a rebellion. The legislature of Jamaica afterwards passes an Act of Indemnity under which the assault is made lawful. The assault is, after the passing of this Act, not a tort.<sup>1</sup>

<sup>1</sup> *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225 ; (1870), L. R. 6 Q. B. (Ex. Ch.) 1.



## CHAPTER XXIX.

## ADMINISTRATION IN BANKRUPTCY.

RULE 180.<sup>1</sup>—The administration in bankruptcy of the property of a bankrupt which has passed<sup>2</sup> to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*).<sup>3</sup>

## Comment.

A creditor, whether an alien or a British subject, can under an English bankruptcy<sup>4</sup> prove for any debt, whether it be an English or a foreign debt,<sup>5</sup> which is due to him from the bankrupt. But a foreigner proving (*e.g.*, for a foreign debt) stands in the same position as does an English creditor proving for an English debt; the equities available under the law of England against a bankrupt are available against a bankrupt or the trustee as representing him,

<sup>1</sup> See Westlake (4th ed.), pp. 174—176; Foote (3rd ed.), pp. 313, 314, 329, 330; *Ex parte Melbourn* (1870), L. R. 6 Ch. 64, especially p. 69, judgment of Mellish, L. J.; *Ex parte Holthausen* (1874), L. R. 9 Ch. 722. And see *Thurburn v. Steward* (1871), L. R. 3 P. C. 478. Compare *Pardo v. Bingham* (1868), L. R. 6 Eq. 485, and *In re Kloebe* (1884), 28 Ch. D. 175, which, though referring to the administration of a deceased person's estate, throws some light on the law governing administration in bankruptcy.

<sup>2</sup> For the effect of an English bankruptcy as an assignment, see Rule 68, p. 329, *ante*, and as a discharge, see Rule 69, p. 339, *ante*, and Rule 117, p. 441, *ante*.

<sup>3</sup> This Rule is in reality an application of the principle that all matters of procedure are governed by the *lex fori*. See chap. xxxii., Rule 193, p. 708, *post*.

<sup>4</sup> As the Rules in this Digest are concerned only with proceedings in England, our Rule, though expressing the general principle followed by English Courts, applies in effect only to an English bankruptcy, and means substantially that under such a bankruptcy the property which has passed to the trustee, *i.e.*, the bankrupt's assets, must be distributed wholly in accordance with the ordinary rules of the English bankruptcy law.

The word "assets," though in this Digest appropriated to the personal property of a deceased person for which an administrator is accountable, is both popularly and legally applicable to the property of a bankrupt which passes to the representative of the creditors for distribution among them.

<sup>5</sup> *Ex parte Melbourn* (1870), L. R. 6 Ch. 64. Compare *In re Kloebe* (1884), 28 Ch. D. 175.

in respect of rights acquired under the law of a foreign country.<sup>1</sup> The distribution of the assets among the creditors; the priorities among the creditors *inter se*;<sup>2</sup> every matter, in short, which concerns the administration of the bankrupt's assets, or, in other words, which can be brought under the head of procedure in the very widest sense of that term—is to be determined in accordance with the ordinary rules of English bankruptcy law; and this is so even though the assets are the proceeds of foreign immovables, *e.g.*, Scotch land, which under the English Bankruptcy Act has passed to the trustee.

Whilst, however, the mode of dealing with the property which has passed to the trustee, or rather with the proceeds thereof, is governed by the law of England, the question what is the property which has passed to a trustee, and subject to what charges it has passed to him, or, speaking generally, what are the rights of the bankrupt which have passed to the trustee, is a matter to be determined in each case by its appropriate law, *e.g.*, if the right be a right to land in Scotland, then by Scotch law; if the right be acquired under a contract made in a foreign country, then by the law governing the contract, which in many instances will be the law of the foreign country (*lex loci contractus*). We come round, in fact, to the general principle that matters of *procedure* are governed by the *lex fori*, but matters of *right* are governed by the law in accordance with which the particular kind of right is to be determined.<sup>3</sup>

*Question.*—How far are the special rules of English bankruptcy law as to the effect of bankruptcy on antecedent transactions<sup>4</sup> enforceable against foreign creditors?

The answer probably is that these rules may be looked upon as matters of procedure, and will, *e.g.*, as to the effect of a fraudulent preference, be enforced against a foreign creditor who proves for his debt under an English bankruptcy.<sup>5</sup>

<sup>1</sup> *Ex parte Holthausen* (1874), L. R. 9 Ch. 722.

<sup>2</sup> *Ex parte Melbourn* (1870), L. R. 6 Ch. 64.

<sup>3</sup> See, as to procedure, chap. xxxii., p. 708, *post*.

<sup>4</sup> See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 45—48, taken together with the definition of "property" in sect. 168. See also p. 330, *ante*.

<sup>5</sup> This is apparently the principle maintained in Scotland. "There is," writes Goudy, "little authority in the law of Scotland on the subject, but, so far as the decisions go, it would appear that our Courts will, whenever they have jurisdiction, enforce our special laws of bankruptcy upon foreign creditors." Goudy, *Law of Bankruptcy in Scotland* (2nd ed.), p. 640, citing *Blackburn, Petr.*, Feb. 22, 1810, F. C.; *Sellrig v. Davis* (1814), 2 Rose, 291; *Ex parte Wilson* (1872), L. R. 7 Ch. 490; *White v. Briggs* (1843), 5 D. 1148.

## Illustrations.

1. *H* and *W* are married in Batavia, and before marriage enter into a contract whereby £1,000 is settled on *W* for her separate use. By Batavian law, such a marriage contract has no effect as regards third persons until registered. The contract is never registered. *H* and *W* come to England. *H* is there made bankrupt. *W* claims to prove for the £1,000. The Batavian law as to registration affects a question of remedy or procedure. All questions of priority of creditors are governed by English law (*lex fori*), and *W* is entitled under the English bankruptcy to prove for debt *pari passu* with other creditors.<sup>1</sup>

2. *N*, a merchant in London, obtains a loan from *A*, a merchant in Prussia, by depositing with *A* the title deeds of a house at Shanghai. No conveyance or memorandum of deposit is made at Shanghai, and the house remains registered there in the name of *N*. *N* is adjudicated a bankrupt in England. Under English law *A* is entitled as against *N* to have the benefit of the contract, and has a lien on the house at Shanghai. *A*'s rights against *T*, the trustee, are governed by English law (*lex fori*). *T* is bound by the equities which bind the bankrupt, and *A* is entitled to have the house sold and the proceeds thereof, up to the amount of the debt to *A*, transferred to him.<sup>2</sup>

3. *N* makes a gift of goods to *A* in France. The gift is made after *N* has committed an act of bankruptcy. Within a month after the making of the gift *N* is adjudicated bankrupt in England. *A* proves for a debt incurred in France and under French law by *N* to *A*. The relation of the trustee's title back, and the effect of such relation on the gift of *N* to *A*, is (*semble*) governed by English law (*lex fori*).

<sup>1</sup> *Ex parte Melbourn* (1870), L. R. 6 Ch. 64, 68, 69. Compare *Thurburn v. Steward* (1871), L. R. 3 P. C. 478.

<sup>2</sup> *Ex parte Holthausen* (1874), L. R. 9 Ch. 722. See especially pp. 726, 727, judgment of James, L. J.

## CHAPTER XXX.

ADMINISTRATION AND DISTRIBUTION OF  
DECEASED'S MOVABLES.

## (A) ADMINISTRATION.

RULE 181.<sup>1</sup>—The administration of a deceased person's movables<sup>2</sup> is governed wholly by the law of the country where the administrator acts, and from which he derives his authority to collect them,<sup>3</sup> *i.e.*, in effect, by the law of the country where the administration takes place (*lex fori*).<sup>4</sup>

Such administration is not affected by the domicile of the deceased.<sup>5</sup>

In this Rule, the term “administration” does not include distribution.

## Comment.

“The established rule now is that in regard to creditors the  
“administration of assets of deceased persons is to be governed  
“altogether by the law of the country where the executor or  
“administrator acts, and from which he derives his authority to  
“collect them, and not by that of the domicile of the deceased.”<sup>6</sup>

<sup>1</sup> Story, s. 524; Westlake (4th ed.), pp. 124—126, 128—130; Foote, pp. 311—314. Mr. Foote does not absolutely agree with the Rule as here laid down. *Preston v. Melville* (1840), 8 Cl. & F. 1; *In re Kloebe* (1884), 28 Ch. D. 175.

<sup>2</sup> As to the administration and devolution of a deceased's person's immovables, see pp. 504, 505, *ante*, and note that the *administration* of such immovables which now passes, with the most limited exception, to the personal representative of the deceased, is governed, in most points, by the same rules as the administration of his movables. See Land Transfer Act, 1897, s. 2, sub-s. (3). All the assets of the deceased are, under an English administration, administered in accordance with the law of England.

<sup>3</sup> Story, s. 424.

<sup>4</sup> See, as to principle that procedure is governed by the *lex fori*, chap. xxxii., p. 708, *post*.

<sup>5</sup> Compare *Cook v. Gregson* (1854), 2 Drew. 286, taken together with *In re Kloebe* (1884), 28 Ch. D. 175, 176, 180, judgment of Pearson, J. But see Foote, pp. 311—313, and *Wilson v. Dunsany* (1854), 18 Beav. 293.

<sup>6</sup> Story, s. 524.

“ Every administrator, principal<sup>1</sup> or ancillary,<sup>2</sup> must apply the “ assets reduced into possession under his grant in paying all the “ debts of the deceased, whether contracted in the jurisdiction “ from which the grant issued or out of it, and whether owing to “ creditors domiciled or resident in that jurisdiction or out of it, “ in that order of priority, which according to the nature of the “ debts or of the assets is prescribed by the law of the jurisdiction “ from which the grant issued.”<sup>3</sup>

This exposition of the law has received judicial approbation,<sup>4</sup> and, in regard to an English administration, with which alone we are practically concerned, leads to the following results:—

*First.* The assets in the hands of the English administrator, wherever collected, are liable for all the debts of the deceased, whether incurred in England or a foreign country.<sup>5</sup>

*Secondly.* In the payment of creditors, all questions of priority are, it would seem, governed wholly by English law (*lex fori*).<sup>6</sup>

The principle of English law appears to be, that every question as to the order in which debts of different kinds are to be paid is a matter of procedure, and therefore to be determined in accordance with the *lex fori*,<sup>7</sup> and hence that an English administrator, in reference to the assets which he is administering under an English grant, must follow the order of priority prescribed by English law; and this whether the creditor claiming payment be an English or foreign, *e.g.*, a French, creditor.<sup>8</sup>

<sup>1</sup> A “ principal administrator ” means an administrator acting in or under the law of the country where the deceased person whose property is being administered died domiciled.

<sup>2</sup> An “ ancillary administrator ” means an administrator who is not a principal administrator.

<sup>3</sup> Westlake, p. 128, s. 110.

<sup>4</sup> *In re Kloebe* (1884), 28 Ch. D. 175, 178, judgment of Pearson, J.

<sup>5</sup> *In re Kloebe* (1884), 28 Ch. D. 175, in which it was held that, in the administration of the English estate of a person dying domiciled abroad, foreign creditors were entitled to dividends *pari passu* with English creditors. *Semble*, there were in this case no foreign assets.

<sup>6</sup> *In re Kloebe*, but compare Foote, pp. 311—313, where doubt is expressed as to the correctness of this statement; and also 1 Williams, Executors (10th ed.), pp. 753—755.

<sup>7</sup> See chap. xxxii., p. 708, *post*.

<sup>8</sup> It has, however, been judicially suggested that, if French assets “ were distributed [in France] so as to give French creditors, as such, priority in distributing “ the English assets, the Court would be astute to equalise the payments, and take “ care that no French creditors should come in and receive anything till the English “ creditors had been paid a proportionate amount.” *In re Kloebe* (1884), 28 Ch. D. 175, 177, judgment of Pearson, J.

A suggestion,<sup>1</sup> however, has been made that where the deceased has died domiciled abroad, and therefore the administration is an ancillary administration, the English administrator ought to look partly to the law of the deceased's domicile, in reference, at any rate, to debts there contracted; but there does not appear to be any sufficient authority in support of this view, which is opposed to the marked tendency of English Courts to determine all matters of procedure, in the most extensive sense of that term, in accordance with the *lex fori*.<sup>2</sup>

*Thirdly.* The principle that an English administrator must, in the administration of the deceased's estate, follow English law exclusively, applies, it would seem, only to assets which he holds as English administrator.

If, for example, he has in England assets collected in a foreign country, *e.g.*, Ireland, under an Irish grant, then these foreign assets should be dealt with in accordance with the law of Ireland. The same person in effect fills a twofold character, viz., that of an English administrator and of an Irish administrator, and such Irish assets he holds and must administer as an Irish administrator.<sup>3</sup>

It must be borne in mind that the word "administration" is in this Rule not used in its most extensive sense: it here means simply the clearing of the deceased's estates from liabilities; it does not include the distribution of the residue or surplus which remains after the estate is cleared among the persons entitled to succeed beneficially thereto. This point is manifestly determinable in accordance with the rules governing the right of beneficial succession.<sup>4</sup>

### Illustrations.

1. The deceased has died owing to *A*, an Englishman, a debt of £20, contracted in England, and to *B*, a Frenchman, a debt of £30, contracted in France. The assets in the hands of the deceased's English administrator are liable for both debts.<sup>5</sup>

<sup>1</sup> See Foote, pp. 311—313; and compare *Wilson v. Dunsany* (1854), 18 Beav. 293; *Cook v. Gregson* (1854), 2 Drew. 286. But *Wilson v. Dunsany* is disapproved. *In re Kloebe* (1884), 28 Ch. D. 175, 180, judgment of Pearson, J.

<sup>2</sup> See chap. xxxii., Rule 193, p. 708, *post*.

<sup>3</sup> *Cook v. Gregson* (1854), 2 Drew. 286; and compare *In re Kloebe* (1884), 28 Ch. D. 175, 178, judgment of Pearson, J.

<sup>4</sup> See chap. xxxi., p. 664, *post*.

<sup>5</sup> *In re Kloebe* (1884), 28 Ch. D. 175.

2. The deceased owes £20 to *A* on an English judgment, and owes £20 to *B* on a Victorian judgment, which for this purpose is a simple contract debt. The £20 due on the English judgment must be paid by the English administrator to *A* in priority to the £20 due to *B* on the Victorian judgment.<sup>1</sup>

3. The deceased, an Englishman residing in Venezuela, has executed an instrument to secure payment to *A* of £1,600. *A* afterwards registers the instrument in the form prescribed by the law of Venezuela, and by that law becomes thereby entitled to have his debt paid out of the general assets of *T* in priority to other creditors. This does not entitle *A* to priority of payment out of assets administered in England.<sup>2</sup>

### (B) DISTRIBUTION.

RULE 182.<sup>3</sup>—The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death.<sup>4</sup>

#### Comment.

The ultimate aim of an administration<sup>4</sup> (if that word be taken in its widest sense) is the due distribution by the administrator of the distributable residue of the deceased's assets among the persons entitled to succeed beneficially thereto.

Distribution, therefore, follows the appropriate rule as to succession, and the succession to, and therefore the distribution of, a deceased's movables is, whether he die intestate<sup>5</sup> or testate<sup>6</sup> (in

<sup>1</sup> See *Cook v. Gregson* (1854), 2 Drew. 286, together with *Harris v. Saunders* (1825), 4 B. & C. 411.

<sup>2</sup> *Pardo v. Bingham* (1868), L. R. 6 Eq. 485. But in this case the assets were equitable assets, and, further, Romilly, M. R., seems to have been of opinion that the administration might be affected by the domicile of the debtor and creditor. "Unless both the debtor and the creditor were domiciled in Venezuela, I think that the registration of this document can only affect assets in Venezuela over which that country has power." *Ibid.*, p. 487, per Romilly, M. R. Whether domicile has any effect? Compare Westlake, p. 129.

<sup>3</sup> See chap. xxxi., *post.* As to the succession to or distribution of immovables in accordance with the *lex situs*, whether they form part of the deceased's real estate or personal estate, see pp. 504, 505, and p. 658, note 2, *ante*.

<sup>4</sup> See pp. 304—306, *ante*.

<sup>5</sup> As to intestate succession, see chap. xxxi., Rule 183, *post*.

<sup>6</sup> As to testamentary succession, see chap. xxxi., Rules 184 to 187, and compare Rules 188, 189, pp. 687, 691, *post*.

general),<sup>1</sup> governed by the law of his domicile at the time of his death.

*Meaning of law of domicile.*—The law of the deceased's domicile in reference to succession means the rules applicable to succession in the case of the particular intestate or testator by the law of the country where he dies domiciled, which in the instance, for example, of an Englishman dying domiciled in a foreign country, need not be the same as the ordinary rules applicable to the case of succession to the property of native (*e.g.*, French) intestates<sup>2</sup> or testators.

*Law at time of death.*—The law which, as far as regards English Courts, governs the succession to a deceased's movables is the law of the deceased's domicile as it stands "at the time of his death"; and this qualification is of importance, for, if a change is made in that law after the death of the intestate or testator, the succession to, and therefore the distribution of, his movables in England is not affected by the change.<sup>3</sup>

Our Rule, in short, amounts to this: that English Courts will in general distribute the movables of a deceased person exactly as the Courts of his domicile would distribute them at the time of his death.

*Question.*—How is the duty of distribution to be performed when the deceased dies domiciled in a foreign country?

The distribution may be carried out either by the English administrator on his own authority, or by or under the direction of the Court (*e.g.*, where an administration action has been brought).

(1) *Distribution by administrator.*—When the deceased dies domiciled in a foreign country, *e.g.*, Victoria, the English administrator (who must in this case be an ancillary administrator) should, after payment of all debts and other claims proved in England—assuming, of course, there is no administration action pending in England—hand over the distributable residue to the personal representative of the deceased under the

<sup>1</sup> As to exceptions, none of which refer to intestate succession, see Exceptions 1 and 2 to Rule 185, pp. 673, 677, *post*; Rule 187, p. 680, *post*, and Rules 188—190, *post*.

<sup>2</sup> See *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431. Compare *In Goods of Laeroix* (1877), 2 P. D. 94; 2 William, Executors (10th ed.), p. 1256, and 1 *Ibid.* pp. 276, 277, cited p. 81, note 2, *ante*.

<sup>3</sup> *Lynch v. Government of Paraguay* (1871), L. R. 2 P. & D. 268; *In re Aganoor's Trust* (1895), 64 L. J. Ch. 521; Story (7th ed.), s. 481.



law of Victoria. This course is open to the English administrator,<sup>1</sup> and, unless he takes the direction of the Court, is (it is conceived) his only safe course.

(2) *Distribution by Court*.—The Court may at its discretion adopt either of two different methods of distribution.

The Court may, on the one hand, hand over the distributable residue to the personal representative of the deceased under the law of his domicile, and leave to such representative the distribution thereof among the beneficiaries. If this course is taken, all persons who, whether as next of kin or otherwise, claim a share in the deceased's estate, must enforce their claims before the tribunals of his domicile.<sup>2</sup>

The Court may, on the other hand, determine for itself what is the law of the deceased owner's domicile, and who are the persons who, in accordance with such law, are entitled to succeed to the deceased's movables, and, having determined this, distribute in accordance with such law, the distributable residue remaining in the hands of the English administrator.<sup>3</sup>

<sup>1</sup> See Westlake, p. 125; *Eames v. Hacon* (1880), 16 Ch. D. 407; (1881), 18 Ch. D. (C. A.) 347; *Re Kloebe* (1884), 28 Ch. D. 175; *De Mora v. Concha* (1885), 29 Ch. D. (C. A.) 268, especially 284, observation of Fry, L. J.; *Re Trufort* (1887), 36 Ch. D. 600, 611, judgment of Stirling, J.; *In re De Penny*, [1891] 2 Ch. 63, 68, judgment of Chitty, J.; *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, especially pp. 502—504, 509, 510, and pp. 463, 464, note; 2 Williams, Executors (10th ed.), pp. 1285, 1286.

The English administrator cannot rightly or safely undertake on his own responsibility to distribute the surplus directly among the persons entitled thereto under the law of Victoria. An administrator would in cases of difficulty obtain the direction or sanction of Court. See, *e.g.*, R. S. C. Ord. LV. rr. 3, 4.

<sup>2</sup> See especially *Enohin v. Wylie* (1862), 10 H. L. C. 1, 13, 14; 31 L. J. Ch. 402, 405, 406. Compare *Eames v. Hacon* (1880), 16 Ch. D. 407; (1881), 18 Ch. D. (C. A.) 347. This, according to Lord Westbury, is the course which the Courts *must* take; and, though his view that the Courts of the domicile have exclusive jurisdiction must now be considered overruled (*Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 39; (1885), 10 App. Cas. 453, 502, 504), yet the course recommended by him is still open to the Court. Compare Westlake, s. 106, p. 126: "Where there is an action for administration in England, it is doubtful whether the Court will insist on carrying that action out to its full completion, by distributing the surplus with such light as it can obtain on the law of the deceased's foreign domicile, or will hand over the surplus to a representative of the deceased in the domicile." *Ibid.*

<sup>3</sup> The right of the Court to pursue this course was apparently disputed by Lord Westbury (see *Enohin v. Wylie* (1862), 10 H. L. C. 1, 12). But his view has not obtained acceptance. *Ibid.* p. 19, judgment of Lord Cranworth; pp. 23, 24, judgment of Lord Chelmsford; and *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 39, judgment of Selborne, C.

## CHAPTER XXXI.

## SUCCESSION TO MOVABLES.

(A) *INTESTATE SUCCESSION.*

RULE 183.<sup>1</sup>—The succession to the movables<sup>2</sup> of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born, or
- (2) he died, or
- (3) he had his domicile of origin, or
- (4) the movables are, in fact, situate at the time of his death.

## Comment.

“The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death [or the domicile of origin], or the situation of the property at that time.”<sup>3</sup> “The universal doctrine, now recognised by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his

<sup>1</sup> See 2 Williams, *Executors* (10th ed.), p. 1256; Story, ss. 480—481 a; *Bruce v. Bruce* (1790), 6 Bro. P. C. 566; *Somerville v. Somerville* (1801), 5 Ves. 749 a; *Stanley v. Bernes* (1831), 3 Hagg. Ecc. 373; *Dogioni v. Crispin* (1866), L. R. 1 H. L. 301.

As to a case in which, though the deceased is permanently settled in a foreign country, not forming part of the British dominions, his domicile at death may still possibly be his domicile of origin, *e.g.*, Canada, see *In re Johnson*, [1903] 1 Ch. 821, and Appendix, Note 1, “Law of a Country and the *Renvoi*.”

<sup>2</sup> Note the difference between “movables” and “personalty,” pp. 74—77, *ante*. Chattels real are not included in movables; they are immovables, and devolve in the case of intestacy in accordance with the *lex situs* (see Rule 141, p. 500, *ante*), *i.e.*, in accordance with the Statute of Distribution (22 & 23 Car. II. c. 10); *Duncan v. Lawson* (1889), 41 Ch. D. 394.

<sup>3</sup> 2 Williams, *Executors* (10th ed.), p. 1256.

“ death.<sup>1</sup> . . . It is of no consequence what is the country of the  
 “ birth of the intestate, or of his former domicil, or what is the  
 “ actual *situs* of the personal property at the time of his death;  
 “ it devolves upon those who are entitled to take it, as heirs or  
 “ distributees, according to the law of his actual domicil at the  
 “ time of his death.”<sup>2</sup>

The Rule applies, be it noted, only to the *succession* in the strict sense of that term. Where a person dies, *e.g.*, intestate and a bastard, so that under the law of the country where he is domiciled there is no succession to his movables, but they are *bona vacantia*, and leaves movables situate in a country, *e.g.*, England, in which he is not domiciled, the title to such movables is governed by the *lex situs*, *i.e.*, under English law the movables being situate in England, the Crown is entitled thereto.<sup>3</sup>

### Illustrations.

1. A French subject dies intestate and domiciled in England. Succession to his movables is governed by the English Statute of Distribution, without any reference to the law of France.

2. A British subject domiciled in France dies intestate in London. The succession to the furniture of his house in London is governed by the rules which regulate in France succession to the movables of a British subject dying domiciled in France.

3. An Englishman domiciled in Scotland, but residing in England, dies in England intestate, and leaves there money and other goods. The deceased whilst domiciled in Scotland had a son, *A*, by *M*, and afterwards, being still domiciled in Scotland, married *M*, whereby *A* is under Scotch law legitimated. At the time of the intestate's death *M* is dead, and *A* is the intestate's only surviving relative. *A* is entitled to succeed to the money and goods in England.<sup>4</sup>

<sup>1</sup> For meaning of “law of domicil at time of death,” compare p. 662, and p. 81, note 2, *ante*.

<sup>2</sup> Story, s. 481. The terms “personal estate” and “personal property” must in these quotations be taken as equivalent to movables. See *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541.

<sup>3</sup> *In re Barnett's Trusts*, [1902] 1 Ch. 847. The doctrine acted upon in this case is clearly laid down in Bar (Gillespie's transl. (2nd ed.)), p. 848.

<sup>4</sup> See *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817; *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216. As to legitimation, see Rule 137, p. 479, *ante*. Whether *A* would be entitled to succeed to English chattels real of intestate? See pp. 489, 490, *ante*.

4. A British subject domiciled in Portugal dies there intestate, leaving no relative except *A*, an illegitimate son, who by Portuguese law is entitled to succeed to the intestate's property. The intestate leaves movables in England. *A* is entitled to succeed to the movables.<sup>1</sup>

5. *N*, a Scotchman domiciled in Scotland, after the birth of *A*, his illegitimate son, has married *A*'s mother, whereby *A* is legitimated under Scotch law. *N*, though domiciled in Scotland until the time of his marriage, acquires after the marriage an English domicile, and at his death is domiciled in England, where he leaves goods. *N* dies intestate in England after the death of his wife, and leaves no surviving relative except *A*. *A* is entitled to succeed to the goods.<sup>2</sup>

6. A British subject dies intestate domiciled in Paraguay, leaving movables in England. At the time of the intestate's death *A* is, under the law of Paraguay, entitled to succeed to the intestate's property. After the intestate's death the legislature of Paraguay changes the rules as to succession so that, under the changed law of Paraguay, *A* is not entitled to succeed to the intestate's property. After the change of the law in Paraguay, *A* claims in our Courts to succeed to the intestate's movables in England. *A* is entitled to succeed to the movables.<sup>3</sup>

7. *D*, an Austrian subject domiciled in Austria, is entitled to a fund in Court in this country. He dies in Vienna illegitimate, intestate and without heirs. By Austrian law the property of an Austrian citizen is in such a case confiscated, as property to which there is no heir, by the *fiscus* (Treasury). The fund is claimed by the Austrian Government as *D*'s successor, under the *lex domicilii*. There is no real succession. The Crown is entitled to the fund under English law (*lex situs*) as *bona vacantia*.<sup>4</sup>

<sup>1</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

<sup>2</sup> See *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266. See chap. xxi., Rule 137, p. 479, *ante*.

<sup>3</sup> See *Lynch v. Government of Paraguay* (1871), L. R. 2 P. & D. 268; *In re Aganoor's Trust* (1895), 64 L. J. Ch. 521; and p. 662, *ante*.

<sup>4</sup> *In re Barnett's Trusts*, [1902] 1 Ch. 847, especially pp. 856, 857, judgment of Kekewich, J.

(B) *TESTAMENTARY SUCCESSION.*(i) *Validity of Will.*

RULE 184.<sup>1</sup>—Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid.<sup>2</sup>

*Comment.*

The general principle which governs testamentary no less than intestate succession is, that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and the succession to his movables, and therefore decides what constitutes his last will, and whether and how far it is valid; and this without regard to the place either of his birth or of his death, or to the situation of the movables at the time of his death. This principle, which is to a certain extent modified<sup>3</sup> when the Courts have to decide how far a will is invalid here on account of grounds of invalidity arising from the law of the testator's domicile, is fully carried out in reference to wills valid by that law. The object of our Courts is to deal with such a will exactly as the Courts of the domicile would deal<sup>4</sup> with it at the time of the testator's death.<sup>5</sup> Hence, on the one hand, if the deceased is a foreigner dying domiciled in England though resident abroad, the will, if it is good according to English law, will be held valid here, without reference to the law of the country to which he belongs by nationality or where he is resident; and, on the other

<sup>1</sup> *In re Price*, [1900] 1 Ch. 442, 451, judgment of Stirling, J.; 1 Williams, *Executors* (10th ed.), pp. 272—283.

Note that Rules 184 to 186, as well as the Exceptions thereto, refer to cases where there has been no change of domicile after the execution of a will. When there has been such change they must be read subject to Rule 187, p. 680, *post*.

<sup>2</sup> *I.e.*, of course, in England.

A conceivable exception to this Rule is a bequest, held valid by the law of the testator's domicile, for the promotion in England of some object opposed to the policy of the law of England. Such a bequest would, it is submitted, be here invalid. But compare *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89, with *Attorney-General v. Mill* (1831), 2 Dow & C. 393; and see p. 669, note 1, *post*.

<sup>3</sup> See Exceptions 1 and 2, pp. 673, 677, *post*, and Rule 187, p. 680, *post*.

<sup>4</sup> See *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431; and compare *In Goods of Dost Ali Khan* (1880), 6 P. D. 6.

<sup>5</sup> See *Lynch v. Government of Paraguay* (1871), L. R. 2 P. & D. 268; *In re Aganoor's Trust* (1895), 64 L. J. Ch. 521; and p. 662, *ante*.

hand, if the deceased is a person resident whether in England or abroad, but domiciled in a foreign country, our Courts will hold valid any will of movables good by the law of the country (*e.g.*, France) where the testator is domiciled.<sup>1</sup>

When once the rights of the parties, under the will of a testator who died domiciled in a foreign country, are determined by the Courts of that country, English tribunals, as elsewhere pointed out,<sup>2</sup> are bound by and follow the decision of the foreign Court.<sup>3</sup>

### Illustrations.

1. A married woman domiciled in Spain died in 1820, leaving a will of movables situate in England. By the law of Spain she was, and by the law of England she was not, then capable of making a will. The will was held valid in England.<sup>4</sup>

2. A Frenchman, domiciled in France but resident in England, makes a will of movables in the form required by English law. The French Courts hold it valid as being made in accordance with the *lex actus*, or, in other words, in accordance with the forms required by the law of the place of execution. The will is valid.<sup>5</sup>

3. A Frenchman domiciled in France makes a holograph will of movables valid by the law of France, but not conforming to the provisions of the English Wills Act, and thereby leaves the furniture of his house in England to A. The will is valid.

4. A testator domiciled in Ireland makes a will leaving money in the English funds to A, upon trusts as to accumulation which are prohibited by the Thellusson Act, 1800 (39 & 40 Geo. III. c. 98), which, however, does not extend to Ireland. The will is valid.<sup>6</sup>

5. A testator domiciled in Victoria bequeaths money to an English corporation for the purchase of land in England for a charitable purpose. Such a bequest, if made by a person domiciled in England, would be invalid. Whether the validity of the

<sup>1</sup> Compare, as to meaning of term "law of a country," Intro., pp. 6, 7, *ante*, and chap. i., pp. 79, 80, *ante*.

<sup>2</sup> See pp. 427, 428, *ante*.

<sup>3</sup> See 1 Williams, Executors (10th ed.), pp. 278—280; *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; *In re Trufort* (1887), 36 Ch. D. 600.

<sup>4</sup> *In Goods of Maraver* (1828), 1 Hagg. Ecc. 498; Story, s. 465.

<sup>5</sup> See *In Goods of Lacroix* (1877), 2 P. D. 94.

<sup>6</sup> See *Freke v. Carbery* (1873), L. R. 16 Eq. 461. Compare *De Fogassiera v. Dupont* (1881), 11 L. R. Ir. 123; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541.

bequest is governed wholly by the law of Victoria (*lex domicilii*) and the will is valid?<sup>1</sup>

(ii) *Invalidity of Will.*

RULE 185.—Any will of movables which is invalid according to the law of the testator's domicile at the time of his death on account of—

- (1) the testamentary incapacity of the testator,<sup>2</sup> or
- (2)\* the formal invalidity of the will (*i.e.*, the want of the formalities required by such law),<sup>3</sup> or
- (3) the material invalidity of the will (*i.e.*, on account of its provisions being contrary to such law),<sup>4</sup>

is (subject to the exceptions hereinafter mentioned, and to the effect of Rule 187)<sup>5</sup> invalid.

Comment and Illustrations.

*Testamentary incapacity of testator.*

A will executed by a testator who is under an incapacity (*e.g.*, on account of minority) by the law of his domicile, will not be held valid in England. Clause 1 of our Rule is not affected by

<sup>1</sup> *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89. Contrast, however, *Attorney-General v. Mill* (1831), 2 Dow & C. 393.

Whether the bequest is valid or not depends on the character of the Mortmain Acts in so far as they refer to bequests for the purchase of land. If these Acts, as held by the Privy Council (*Mayor of Canterbury v. Wyburn*), simply place a limit on the freedom of death-bed gifts, they do not apply to persons not domiciled in England, and the bequest is valid. But if these Acts, as seems to have been hitherto assumed (*Attorney-General v. Mill*; Westlake, p. 206; Story, s. 446), check the placing of English land in mortmain, then the bequest, as it affects English land, is governed by the *lex situs* and invalid.

<sup>2</sup> *In Goods of Maraver* (1828), 1 Hagg. Ecc. 498; Story, s. 465, citing *Lawrence v. Kittridge*, 21 Conn. 582 (Am.).

<sup>3</sup> 1 Williams, Executors (10th ed.), pp. 272—283; *Craigie v. Lewin* (1843), 3 Curt. 435; *De Zichy Ferraris v. Hertford* (1843), 3 Curt. 468, 486; *Bremer v. Freeman* (1857), 10 Moore, P. C. 306; *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402.

<sup>4</sup> *Whicker v. Hume* (1858), 7 H. L. C. 124; 28 L. J. Ch. 396; *Thornton v. Curling* (1824), 8 Sim. 310; *Campbell v. Beaufoy* (1859), Johns. 320. Compare Westlake, p. 114.

<sup>5</sup> *I.e.*, Rule as to effect of change of domicile after execution of will. See p. 680, *post*.

the Wills Act, 1861 (24 & 25 Vict. c. 114),<sup>1</sup> ss. 1 and 2, and applies as well to aliens as to British subjects.<sup>2</sup>

1. Testator is domiciled in a country where the age of majority is 25, and where a minor cannot make a will. He, when resident but not domiciled in England, makes a will of movables at the age of 22 and dies. The will is invalid.

2. An Englishman, domiciled in England but living in Virginia, makes a will when 19 years of age. The will, though valid by the law of Virginia, is invalid here, on the ground that an infant is incapable of making a will.<sup>3</sup>

### *Formal invalidity of will.*

A will, though made by a person capable of making it, may nevertheless be invalid for want of some formal requisite—*e.g.*, signature by the testator, attestation by the required number of witnesses, and so forth. It may, in short, be defective for want (to use the terms of English law) of due execution. Such a defect constitutes a formal invalidity.

The question whether a will is duly executed, or, in other words, whether it is or is not formally valid, must be determined in accordance with the law of the testator's domicile. In cases, in short, of testamentary disposition, as in cases of intestate succession, the rule of our Courts (though subject now, as regards formal validity, to considerable exceptions<sup>4</sup>) is to look to the law of the testator's domicile. This, it should carefully be noted, is still the rule. It applies to all wills, whether of British subjects or of aliens, which, for whatever reason, do not fall within the exceptions to Rule 185.<sup>5</sup>

1. An American citizen domiciled at New York, but resident in England, makes his will while in England, according to the formalities required by the English Wills Act. The will is invalid, according to the law of New York, for want of publication.<sup>6</sup> His will is invalid.

<sup>1</sup> These sections are reproduced in Exceptions 1 and 2, pp. 673, 677, *post*. But see Rule 187, p. 680, *post*.

<sup>2</sup> *In Goods of Maraver* (1828), 1 Hagg. Ecc. 498; Story, s. 465.

<sup>3</sup> Revised Code of Virginia, 224, cited 4 Kent (12th ed.), p. 506, note (e).

<sup>4</sup> See Exceptions 1 and 2, pp. 673, 677, *post*.

<sup>5</sup> See, *e.g.*, *In Goods of Lacroix* (1877), 2 P. D. 94; but note that the "law of the testator's domicile" means, as already explained (see p. 81, note 2, and p. 662, *ante*), the law or rule applicable to the particular case.

<sup>6</sup> See 4 Kent (12th ed.), p. 515, note (b).



2. An American citizen, domiciled at New York, executes when in France a holograph will, valid by the law of France, but not attested as required by the law of New York. He leaves movable property in England. His will is invalid.

3. A British subject born in the Mauritius, but whose parents were at the time of his birth domiciled in France, comes to England and acquires an English domicile. He, whilst in London, executes a will of movables in England according to the forms required by the law of Mauritius, but not according to the English Wills Act. The will is invalid.<sup>1</sup>

4. A naturalized British subject is resident in England, but his domicile of origin is in one of the United States. He retains his American domicile, and whilst on a visit to the Continent makes a will, which is executed in accordance with the formalities required by the English Wills Act, but not in accordance with the formalities required either by the law of the testator's domicile or by the law of the country where the will is made. The will is invalid.<sup>2</sup>

*Material invalidity.*

A will made by a person under no testamentary incapacity<sup>3</sup> and duly executed or formally valid<sup>3</sup> may nevertheless be invalid, or wholly or in part inoperative, because it contains provisions to which the law will not give effect. Thus, English law prohibits bequests upon trust for accumulation beyond certain periods;<sup>4</sup> the law of France,<sup>5</sup> as of Scotland,<sup>6</sup> invalidates bequests of more than a certain proportion of the testator's property in derogation of the rights of his widow or children; the law of Louisiana makes void a bequest for charitable purposes to an unincorporated body of persons.<sup>7</sup> Such invalidity, arising from the nature of the

<sup>1</sup> Remark that this will does not come within Exception 1, p. 673, *post*, nor within Exception 2, p. 677, *post*.

<sup>2</sup> Such a will, being invalid by the law of the testator's domicile, falls within Rule 185, p. 669, *ante*, and does not fall within either of the Exceptions to it. See App., Note 18, "The Wills Act, 1861." See, as further illustration, *In Goods of Gatti* (1879), 27 W. R. 323; and contrast *In re Gally* (1876), 1 P. D. 438.

<sup>3</sup> See p. 669, *ante*.

<sup>4</sup> The Thellusson Act (39 & 40 Geo. III. c. 98).

<sup>5</sup> See *Thornton v. Curling* (1824), 8 Sim. 310.

<sup>6</sup> Conf. Bell, *Principles of Law of Scotland* (9th ed.), ss. 1579, 1582, 1592.

<sup>7</sup> *Macdonald v. Macdonald* (1872), L. R. 14 Eq. 60. See Scotch case, *Boe v. Anderson* (1862), Ct. of Sess. Rep., 2nd ser., xxiv., p. 732.

bequest, is termed *material* or *intrinsic* invalidity, and whether a will is or is not void wholly or in part on account of such material or intrinsic invalidity depends upon the law of the country where the testator is domiciled. Thus, where a British subject domiciled in France made a disposition of his movable property which, though valid by the law of England, was invalid by the law of France, the will was held inoperative.<sup>1</sup>

Nor is the effect of the material invalidity of a will affected, at any rate where there is no change of domicile, by the Wills Act, 1861 (24 & 25 Vict. c. 114).<sup>2</sup> That Act renders formally valid, and therefore admissible to probate, a will which might otherwise be bad for defects of form; but even when a will has been admitted to probate in solemn form, and therefore must be held not defective as to its formal requisites, it is, in so far as its provisions contravene the law of the testator's domicile, treated here as inoperative, and the persons obtaining probate will be held by the Courts to be trustees for those who would be entitled to succeed to deceased's property if (as far as the inoperative provisions go) he had died intestate.

Where a will was admitted to probate in solemn form, but there was a doubt whether the provisions were valid according to the testator's *lex domicilii*, the law was thus laid down:—

“A probate is conclusive evidence that the instrument proved  
“was testamentary according to the law of this country. But it  
“proves nothing else. That may be illustrated in this way:  
“Suppose there was a country in which the form of a will was  
“exactly similar to that in this country, but in which no person  
“could give away more than half his property. Such an instru-  
“ment made in that country by a person there domiciled, when  
“brought to probate here, would be admitted to probate as a  
“matter of course. Probate would be conclusive that it was testa-  
“mentary, but it would be conclusive of nothing more; for after  
“that there would arise the question, how is the Court that is to  
“administer the property to ascertain who is entitled to it? For  
“that purpose you must look beyond the probate to know in what  
“country the testator was domiciled, for by the law of that

<sup>1</sup> *Thornton v. Curling* (1824), 8 Sim. 310; *Campbell v. Beaufoy* (1859), Johnson, 320. See *Whicker v. Hume* (1858), 7 H. L. C. 124, 156, 157.

These cases were no doubt decided in reference to the law as it stood before 1861, but (at any rate when there is no change of domicile) the Wills Act, 1861, does not, it is submitted, affect the matter.

<sup>2</sup> See Rule 187, p. 680, *post*, and App., Note 18, “The Wills Act, 1861.”

“country the property must be administered. Therefore, if the testator, in the case I have supposed, had given away all his property, consisting of 10,000*l.*, it would be the duty of the Court that had to construe the will to say 5,000*l.* only can go according to the direction in the will; the other 5,000*l.* must go in some other channel.”<sup>1</sup>

1. *T*, domiciled in England, but resident in France, makes a will leaving his movable property to trustees upon trusts for accumulation beyond the period allowed by the Thellusson Act. The will, in whatever form it is made, is as regards such trusts invalid.<sup>2</sup>

2. *T*, domiciled in France, makes a will while in England containing provisions in contravention of French law. The will is made in the form required by French law. It is here, as regards such provisions, inoperative and invalid.<sup>3</sup>

3. *T* dies domiciled in England. He bequeaths “unto the Priests of the Society of Jesus, [domiciled] at Richmond, Victoria, 2,000*l.* sterling, to be spent in masses for the soul of my late wife.” The legacy is void under the law of England (*lex domicilii*) as a gift to a superstitious use; it is valid under the law of Victoria. The will is, so far as the legacy is concerned, invalid.<sup>4</sup>

*Exception 1.*<sup>5</sup>—Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either  
[1] by the law of the place where the same was made, or

<sup>1</sup> *Whicker v. Hume* (1858), 7 H. L. C. 124, 156, 157, judgment of Cranworth, C. Conf. judgment of Lord Wensleydale, *ibid.*, 165, 166.

<sup>2</sup> *Freke v. Carbery* (1873), L. R. 16 Eq. 461.

<sup>3</sup> *Thornton v. Curling* (1824), 8 Sim. 310.

<sup>4</sup> A legacy by a testator domiciled in England, void by the law of England, is invalid though given to persons not domiciled in England. *In re Elliott, Elliott v. Johnson* (1891), 39 W. R. 297, judgment of North, J.

<sup>5</sup> The Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1. See App., Note 18, “The Wills Act, 1861.”

- [2] by the law of the place where such person was domiciled when the same was made, or  
 [3] by the laws then in force in that part [if any]<sup>1</sup> of His Majesty's dominions where he had his domicile of origin.

### Comment.

This Exception is (except the figures and words in square brackets) given in the terms of the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1; the words "if any," suggested by *In Goods of Lacroix*,<sup>2</sup> are added for the sake of clearness.

It will, however, be observed that part of the Exception<sup>3</sup> refers to cases in which there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not, strictly speaking, within an Exception to Rule 185. The effect of a change of domicile<sup>4</sup> is considered in the comment upon Rule 187.

A will to come within this Exception must be, first, a will "made out of the United Kingdom"<sup>5</sup> (*e.g.*, in Guernsey or in France); secondly, a will "made by a British subject," who may be either a natural-born or a naturalized<sup>6</sup> British subject, but must be a British subject at the time when the will is executed;<sup>7</sup> thirdly, a will of "personal estate." The term "personal estate" is used in its strict technical sense, and includes all interests in English land (*e.g.*, leaseholds) which come within the description of personal estate,<sup>8</sup> though such interests are not movables.<sup>9</sup>

When the above three conditions are fulfilled, a will (though not executed according to the form required by the law of the testator's domicile at the time of his death) will be held to be "well executed for the purpose of being admitted to probate"

<sup>1</sup> See *In Goods of Lacroix* (1877), 2 P. D. 94. The expression "His Majesty's dominions" is of course equivalent to "British dominions" as defined p. 68, *ante*.

<sup>2</sup> (1877), 2 P. D. 94.

<sup>3</sup> *Viz.*, the words in the parenthesis and clause 2.

<sup>4</sup> See, especially, p. 681, note 4, *post*.

<sup>5</sup> For meaning of "United Kingdom," see p. 68, *ante*.

<sup>6</sup> *In Goods of Gally* (1876), 1 P. D. 438.

<sup>7</sup> *In Goods of Von Buseck* (1881), 6 P. D. 211; *Bloxam v. Favre* (1883), 8 P. D. 101, 105, judgment of Hannen, Pres., and (1884), 9 P. D. (C. A.) 130. •

<sup>8</sup> *In re Grassi*, [1905] 1 Ch. 584; *Carlton v. Carlton* (1887), 35 W. R. 711.

<sup>9</sup> See pp. 74—77, *ante*.

(*i.e.*, will be held formally valid), if executed according to any of the forms specified in the Exception.

As the Wills Act, 1861 (24 & 25 Vict. c. 114), does not invalidate<sup>1</sup> a will made in any form which would be valid independently of the Act, a British subject can still make a valid will of movables by following the form required by the law of his actual domicile. Hence it may happen that a British subject possibly has, when residing out of the United Kingdom, a choice of three<sup>2</sup> different forms, according to any one of which he may make a will of movables which will be held, as far as form goes, valid in England. Thus, a British subject is domiciled in Germany. At the moment of making his will he is travelling in Italy. He is the son of Canadian parents and has a Canadian domicile of origin. He may make a valid will of movables in any one of three different forms, viz., the German form (*lex domicilii*), the Italian form (*lex actus*), the Canadian form (*lex domicilii originis*).

If, however, the testator is a *naturalized* British subject, his will, if made only in accordance with the form required by the law of the place where he has his domicile of origin, may very well turn out to be invalid. The testator, for example, is a Frenchman whose domicile of origin is French. He becomes a British subject by naturalization. He is domiciled in Massachusetts and is resident in New York, where he makes his will in accordance with the forms required by the law of the place where he has his domicile of origin (viz., France), but not in accordance with the forms required by the law of New York. The will is invalid. It is not made according to the forms required by the law of the country where the testator is domiciled, viz., Massachusetts. It is not made according to the forms required by the law of the place where it is made, viz., New York. It is made according to the forms required by the law of the place where the testator has his domicile of origin (viz., France), but this place is not "part of His Majesty's dominions."

If, indeed, the law of Massachusetts held such a will valid when

<sup>1</sup> "Nothing in this Act contained shall invalidate any will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act." The Wills Act, 1861, s. 4.

<sup>2</sup> If there has been a change of domicile, he has in effect a choice of four different forms. See p. 667, note 1, *ante*; and Rule 187, p. 680, *post*.

made by a British subject,<sup>1</sup> the will might be good as being made in accordance with the testator's *lex domicilii*, but it may pretty confidently be assumed that the Courts of Massachusetts would not hold the will valid, and therefore that it would neither under Rule 184 nor under Exception 1 be held valid in England.

### Illustrations.

1. *T*, a British subject domiciled in England, goes for a few hours to Boulogne. While there he executes a will of all his personal property, including English leaseholds, in accordance with the forms required by the law of France, but not in accordance with the forms required by the Wills Act, 1837. The will is valid.

2. The circumstances are the same as in Illustration 1, except that *T* executes a will of all his real and personal property. The will is, as regards the real property, invalid, but as regards the personal property, valid.<sup>2</sup>

3. *T*, a British subject, is the son of Canadian parents and has a Canadian domicile of origin. He is travelling in Italy. He is domiciled in Denmark. He makes a will of all his movable property in accordance with the form required either (a) by the law of Denmark (*lex domicilii*), or (b) by the law of Italy (*lex actus*), or (c) by the law of Canada (*lex domicilii originis*). The will is valid.

4. *T* is a Frenchman whose domicile of origin is French. He has become a British subject by naturalization. He is domiciled in Massachusetts. He makes a holograph will in accordance with the forms required by the law of France (*lex domicilii originis*), but not in accordance with the forms required by the law of Massachusetts, where he is domiciled. The will is invalid.

5. *T*, an Englishwoman, was a natural-born British subject and at her birth domiciled in England. She marries a German subject and thereby becomes an alien. After her marriage *T* executes a will of movables executed in accordance with the forms required by English law (*lex domicilii originis*), but not in accordance with the forms required by German law. The will is invalid.<sup>3</sup>

<sup>1</sup> See *In Goods of Lacroix* (1887), 2 P. D. 94, where a will made by a Frenchman naturalized in England but domiciled in France was, though made in the English form, held valid on the ground that the French Courts held such a will good in the case of a British subject.

<sup>2</sup> Compare p. 674, *ante*.

<sup>3</sup> *Bloxam v. Favre* (1884), 9 P. D. (C. A.) 130. *T* at the time of executing the will was an alien, and therefore the will does not come within Exception 1.

*Exception 2.*<sup>1</sup>—Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

#### Comment.

This Exception reproduces verbatim the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 2. It will be noticed that the words in parenthesis refer to cases where there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not, strictly speaking, within an Exception to Rule 185. The effect of the terms referring to a change of domicile is considered in the comment upon Rule 187.

A will to come within this Exception must be: first, a will “made within the United Kingdom”; secondly, a will made by a “British subject,” who may be either a natural-born or a naturalized British subject, but must be a British subject at the time when the will is executed;<sup>2</sup> thirdly, a will of “personal estate” in the strict sense of that term.<sup>3</sup> If these conditions are satisfied, a will (though not duly executed according to the law of the testator’s domicile) will be held to be well executed, and will be admitted to probate (*i.e.*, will be held formally valid) if executed “according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.” Thus, a British subject may, when within the United Kingdom, make a will of movables which is to be held duly executed if he makes it either according to the form required by the law of the country where he is domiciled (*e.g.*,

<sup>1</sup> 24 & 25 Vict. c. 114, s. 2. See App., Note 18, “The Wills Act, 1861”; note that “United Kingdom” does not include the Isle of Man or the Channel Islands: see p. 68, *ante*.

<sup>2</sup> Compare p. 674, note 1, *ante*.

<sup>3</sup> See p. 674, *ante*.

Mauritius) or according to the form required by the law of the country where the will is made, *e.g.*, Scotland.

A will, it should be noticed, which falls within either Exception 1 or Exception 2, though it must be held by an English Court to be duly executed or free from any formal defect, may still, as before the Act of 1861, be invalid, either because the testator is, according to the law of his domicile, incapable<sup>1</sup> of making a will, or because the will is materially invalid or inoperative as containing provisions contravening the law of the testator's domicile.

**SUB-RULE.**—The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate.

#### Comment.

This Sub-Rule is an immediate result of the principle that the validity of a will<sup>2</sup> is in general determined by the law of a testator's domicile. A French citizen dies domiciled in England, leaving an unattested testamentary document, written wholly in his own hand and signed by himself. At the moment of executing it he is resident in Paris; he leaves no other will. Our Courts will decide, looking wholly to ordinary English law, that the document is not a will, *i.e.*, that the deceased has died intestate. If, on the other hand, the testator had died in England but domiciled in France, and the document had been executed in England, our Courts would, in deciding whether it constituted a will or not, have looked wholly to French law. In either case, therefore, whether the testator does or does not leave a valid will, or, in other words, whether he does or does not die intestate, is determined by our Courts in accordance with the law of the deceased's domicile.

The effect, however, of Exceptions 1 and 2 to Rule 185,<sup>3</sup> and of Rule 187,<sup>4</sup> or, in other words, of the Wills Act, 1861 (24 & 25 Vict. c. 114), occasionally is that wills are held valid by our Courts though not made in accordance with the testator's *lex domicilii*, or, in other words, that a deceased person is held by English Courts

<sup>1</sup> See Rule 185, p. 669, *ante*.

<sup>2</sup> See Rule 184, p. 667, *ante*, and Rule 185, p. 669, *ante*; and compare Rule 183, p. 664, *ante*.

<sup>3</sup> See pp. 673, 677, *ante*.

<sup>4</sup> See p. 680, *post*.



to have died testate who, according to the law of his domicile at the time of his death, has died intestate.

(iii) *Interpretation of Will.*

RULE 186.—Subject to the exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made.

Comment.

This Rule bears upon two different cases:—

*First.* Where the testator uses technical terms of law, which have a definite meaning attached to them by the law of his domicile, his will must be interpreted with reference to such law.

*Secondly.* Where he has used terms the meaning of which is not governed by a rule of law, such as names of measures, weights, money, &c., it is reasonable to presume,<sup>1</sup> in the absence of ground to the contrary, that he meant the measures, weights, &c., known by these names in the country where he was domiciled.

Except, however, in the cases in which the construction of a will is governed by an absolute rule of law, the maxim, that the terms of a will should be construed with reference to the law of the testator's domicile, is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country.<sup>2</sup>

*Exception* —Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country.

Comment.

There are at least two different cases to which the principle of this Exception applies:<sup>3</sup>

*First.* When a will is expressed in the technical terms of the

<sup>1</sup> See Intro., General Principle No. VI., pp. 59, 60, *ante*.

<sup>2</sup> *In re Price*, [1900] 1 Ch. 442, 452, 453, judgment of Stirling, J.; *In re D'Este's Settlement*, [1903] 1 Ch. 898, 900, judgment of Buckley, J.; *In re Scholefield*, [1905] 2 Ch. 408.

<sup>3</sup> Compare 1 McLaren, Law of Wills and Succession, ss. 63—70.

country where it is executed, the presumption is that the testator had reference to the law of the place of execution, and the will, therefore, should be construed with reference to that law. Thus, a testator domiciled in England, but living in France, executes a will there in French, which is expressed in all the technical terms of French law. Such a will ought, it is conceived, to be interpreted with reference to French law.

*Secondly.* When a will is expressed in the technical terms of the country where it is to be carried into effect, the presumption again is that the testator had reference to the law of the country where the will was to be carried into effect, and the will, therefore, should be construed with reference to that law.

Thus, an Englishman domiciled in France executes a will there, leaving his money on English trusts to be executed in England. The will is expressed in the technical terms of English law. There cannot, it is conceived, be a doubt that the will must be interpreted with reference to English law.

*(iv) Effect of Change of Testator's Domicil after  
Execution of Will.*

RULE 187.—[Subject to the possible exception hereinafter mentioned] no will or other testamentary instrument [whether executed by a British subject or by an alien<sup>1</sup>] shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicil of the person making the same.<sup>2</sup>

**Comment.**

A testator may execute his will when domiciled in France, and may die when domiciled in England. If this is so, the question arises whether the validity of the will depends on the law of France or on the law of England. It is to a case of this kind that Rule 187 applies.

This Rule, if we omit the words in brackets, reproduces verbatim the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3;<sup>3</sup> with this Rule

<sup>1</sup> This view confirmed: *Re Groos*, [1904] P. 269.

<sup>2</sup> Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3.

<sup>3</sup> See App., Note 18, "The Wills Act, 1861."

should be read the two Exceptions to Rule 185<sup>1</sup> whereof Exception 1<sup>2</sup> reproduces the Wills Act, 1861, s. 1, and Exception 2<sup>3</sup> reproduces the Wills Act, 1861, s. 2. Our Rule, taken together with that part of these Exceptions which refers to a change of domicile, embodies an alteration in the law with respect to the effect on the validity of a will of a change in the testator's domicile after the execution of the will.<sup>4</sup>

Up to 1861 our Courts probably held<sup>5</sup> (as appears still to be maintained by the Courts of those parts of the United States where the English common law prevails<sup>6</sup>) that a will invalid in point of form by the law of the country where the testator dies domiciled is to be held invalid, even though perfectly valid according to the law of the country where the will was executed. Thus, if a testator, while domiciled in France, made a holograph will in the form allowed by the law of France, but not duly

<sup>1</sup> See p. 669, *ante*.

<sup>2</sup> See p. 673, *ante*.

<sup>3</sup> See p. 677, *ante*.

<sup>4</sup> It is difficult to understand the precise relation in this matter between sects. 1 and 2, on the one hand, and sect. 3, on the other, of the Wills Act, 1861. Sect. 1 and sect. 2 each provide that a will of a British subject which comes within the terms of the section shall, as regards personal estate, be held to be well executed "whatever may be the domicile of such person at the time of making the same, or at the time of his or her death"; whilst sect. 3 specifically provides that a will shall be held to be well executed "if the same be made according to the forms required . . . by the law of the place where such person was domiciled when the same was made." When it is remembered that a will of movables, independently of the Act, is valid if made in accordance with the forms required by the law of the place where the testator is domiciled at the time of his death (compare the Wills Act, 1861, s. 4), it seems to follow that a will of movables made by a British subject is prevented, by sects. 1 and 2 of the Wills Act, 1861, from being rendered invalid by change in the testator's domicile. But sect. 3 enacts that no will shall become invalid by reason of any subsequent change of domicile of the person making the same. The result, then, in respect to the will of a British subject would on the whole appear to be that, as regards the effect to be attributed to a change in the testator's domicile after the execution of his will, sect. 3 overlaps, so to speak, sects. 1 and 2, or, in other words, that the law would, as regards the will of such British subject, be unaltered, were the provisions in sects. 1 and 2, which have regard to a change of domicile, omitted. (See App., Note 18, "The Wills Act, 1861.") But sects. 1 and 2 apply only to a will made by a British subject, whereas sect. 3 applies to a will made by an alien. *Re Groos*, [1904] P. 269.

<sup>5</sup> The law before 1861 as to the effect of a change of domicile on the validity of a will was not free from doubt. Compare Story, s. 479 g, and Westlake (1st ed.), s. 326.

<sup>6</sup> See Story, s. 479 g, citing *Nat v. Coon*, 10 Miss. 543. See *Dupuy v. Wurtz*, 53 N. Y. 556; *Moultrie v. Hunt*, 23 N. Y. 394.

executed according to the English Wills Act, and afterwards died domiciled in England, his will was, before 1861, held invalid here.<sup>1</sup> The enactment (the Wills Act, 1861, s. 3) embodied in Rule 187 was passed to remedy the inconveniences or remove the doubts arising from this state of the law.

As the Wills Act, 1861 (24 & 25 Vict. c. 114), applies to all wills made by persons who die after 6th August, 1861, and as the third section of the Act applies to the wills both of aliens and of British subjects, a will made by a person capable of making it by the law of his domicile at the time of its execution, and made in the form required by such law, will not now be treated by any English Court<sup>2</sup> as invalid, either because the testator was under a testamentary incapacity by the law of the country where he died domiciled (in which case the law seems to have been the same before the Act as it is now), or because the will is not made in the form required by the law of such country.

It is also clear that all questions of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicile.

*First Question.*—Can a will, which is invalid by the law of the testator's domicile at the time of its execution, be rendered valid by his subsequent change of domicile?

As we are concerned only with the rules of law applied by English Courts, the question raised is, whether our Courts will or will not, under all circumstances, hold a will invalid because it was invalid by the law of the testator's domicile at the time of its execution? This inquiry can arise only on the supposition that the will, though invalid by the law of the testator's domicile at the time of its execution, would (but for the possible effect of that law) be valid by the law of the testator's domicile at the time of his death. We must further suppose that the will is not one which, being executed by a British subject, is made in one of the forms allowed by the Wills Act, 1861, ss. 1 and 2, or, in other words, which comes within either of the Exceptions to Rule 185.

In these circumstances the answer to the inquiry is in no way affected by the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3, and

<sup>1</sup> In the case of an Englishman making his will in England and dying domiciled in France, inconvenience would not arise, since Continental Courts maintain the principle *locus regit actum*, or, as applied to the present case, that a will is formally valid if made according to the forms required by the law of the place of execution.

<sup>2</sup> Or by any Court throughout the British dominions.

is probably different according as the testator dies domiciled in England or in a foreign country.

*First.* Where the testator, having made his will in another country, dies domiciled in England, the view our Courts will take of the will depends, it is conceived, on the cause of its invalidity under the law of the testator's domicile at the time of execution.

The *capacity* of a testator to make a will must be determined by the law of his domicile at the time the will is made. "The law of the actual domicile of the party at the time of the making of his will or testament [is]," it has been laid down on high authority, "to govern as to that capacity or incapacity."<sup>1</sup> Hence, if the testator is incapable of making a will by the law of his domicile at the time of its execution, his will must, it would seem, be invalid at the time of his death.

The *form* of a will is perhaps to be determined by the law of the testator's domicile at the time of his death.<sup>2</sup> If, therefore, the will was invalid only for want of the form required by the law of the testator's domicile at the time of its execution, the will might perhaps, under the circumstances supposed, be held valid.

The *material* or intrinsic validity of a will depends on the law of the testator's domicile at the time of his death.<sup>3</sup>

If, therefore, the will was invalid or inoperative, according to the law of the testator's domicile, at the time of its execution, on account of its *material invalidity*, i.e., on account of its provisions, but the provisions of the will are not opposed to the law of the testator's domicile at the time of his death, the will is valid.

*Secondly.* Where the testator, having made his will, then, after a change of domicile, dies domiciled in a foreign country, the effect of a change of domicile in making the will valid will depend wholly on the law of the country where the testator dies. If on any ground the will is good by the law of his last domicile (e.g., France), it will be treated as valid in England.

<sup>1</sup> Story, s. 465, approved by Phillimore, s. 863. See, however, *contra*, Westlake (4th ed.), p. 114, and compare Savigny, s. 377, p. 282.

<sup>2</sup> *I.e.*, where, as in the case under consideration, 24 & 25 Vict. c. 114, does not apply.

<sup>3</sup> "There is a universal agreement in referring to the law of the domicile at death, as opposed to that of the domicile when the will was made, all questions of its intrinsic validity: as of the proportion of his estate of which the testator may dispose, legitim, disherison of natural heirs by simple preterition, and so forth." Westlake (1st ed.), s. 328, p. 310. These words are cited from the first edition of Westlake, *Private International Law*, published in 1859. They do not, as far as I have observed, recur in his later editions; but see Westlake (4th ed.), p. 114. They express, however, a sound principle.

*Second Question.*—When a testator or testatrix, having made a will, subsequently changes his or her domicile, and also whether before or after such change of domicile marries, what is the law by which to determine whether the marriage operates as a revocation of the will?

This inquiry is raised by the fact that under the law of some countries (*e.g.*, England) a marriage *ipso facto* revokes any will made before marriage by either party to the marriage, whilst under the law of other countries (*e.g.*, Scotland or France) marriage does not revoke a will made before marriage either by the husband or the wife. When, therefore, to take one example only, *H* makes a will whilst domiciled in England, and afterwards acquires a Scotch domicile and marries *W*, an Englishwoman, it is clearly necessary to determine on his death whether the validity of his will is to be determined by the law of England, where he was domiciled when he made it, or by the law of Scotland, where he is domiciled at his death. If its validity depends upon the law of England, it has been revoked by his marriage. If its validity depends upon the law of Scotland, it remains in force at the time of his death. The answer to our question, both in this and in every other case that can arise, is that English Courts determine the effect of marriage as the revocation of a will of movables made before marriage by the law of the country where the testator or the testatrix is domiciled at the moment of the marriage.<sup>1</sup> In order fully to appreciate the effect of the rule upheld by our Courts, it must be remembered that the domicile of a wife becomes, at the moment of marriage, the same as the domicile of her husband. English Courts therefore, in effect, hold that the question whether or not a marriage operates as the revocation of a will which has been made by either husband or wife before marriage, must be determined in accordance with the law of the country where he is domiciled at the moment of the marriage. Thus, if he is then domiciled in England, the marriage revokes any will already made, either by himself or by his wife, and it is not rendered valid by his afterwards acquiring a Scotch domicile. If at the moment of the marriage he is domiciled in Scotland, neither his nor his wife's will is revoked by the marriage, even though at the time of his death they have acquired an English domicile. Nor is the

<sup>1</sup> *In Goods of Reid* (1866), L. R. 1 P. & D. 74; *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211; *Re Groos*, [1904] P. 269; *Westerman v. Schwab* (1905), 13 Sc. L. T. R. 594.

principle adopted by our Courts inconsistent with Rule 187, or in other words, with the Wills Act, 1861, s. 3. Even in the case of a Scotchwoman, who, by marrying a Scotchman domiciled in England, revokes her will made before marriage, the revocation is not in reality caused by a change of domicil, but by a very different thing—the doing when domiciled in England of an act (namely, marrying) which under the law of England revokes her will.<sup>1</sup>

### Illustrations.

1. A testator, when domiciled in France, makes a holograph will of movables valid by the law of France, but not attested by the witnesses required by the English Wills Act. He afterwards becomes domiciled in England and dies there. The will is valid.<sup>2</sup>

2. An Englishman is domiciled in a country where minority ends at 25, and minors are under a testamentary incapacity. He makes a will of movables at the age of 22, and after he has attained the age of 25 acquires a domicil and dies in England. His will would (probably) be held invalid in England.

3. An alien when domiciled in a foreign country executes in England a will of movables according to the forms required by the law of England, but not in accordance with the forms required by the law of his domicil. He afterwards becomes domiciled and dies in England. The will is possibly valid (?).<sup>3</sup>

4. A Frenchman domiciled in France makes a will bequeathing his movable property in a way prohibited by the law of France, but not prohibited by the law of England. He becomes domiciled and dies in England. The will (*semble*) is valid.

5. *T*, a man domiciled in Scotland, makes a will of movables there and then marries. After his marriage he becomes and dies domiciled in England. His will is valid,<sup>4</sup> *i.e.*, is not revoked by the marriage.

<sup>1</sup> “The rule of English law which makes a woman’s will null and void on her “marriage is part of the matrimonial law, and not of the testamentary law.” *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 240, judgment of Vaughan Williams, L. J.

<sup>2</sup> Rule 187, p. 680, *ante*. See the Wills Act, 1861, s. 3.

<sup>3</sup> See p. 683, *ante*.

<sup>4</sup> *In Goods of Reid* (1866), L. R. 1 P. & D. 74. The reader should bear in mind that under the law of England marriage does revoke, whilst under the law of Scotland it does not revoke, a will made before marriage.

6. *T*, a man domiciled in England, makes a will of movables there and then marries. After his marriage he becomes and dies domiciled in Scotland. His will is invalid, *i.e.*, is revoked by the marriage.<sup>1</sup>

7. *T*, a man domiciled in Scotland, makes a will of movables there. *T*, after making his will, acquires a domicile in England, and whilst domiciled in England marries. *T* afterwards resumes his Scotch domicile and dies domiciled in Scotland. His will (*semble*) is invalid.<sup>2</sup>

8. *T*, an unmarried Scotchwoman, makes a will of movables valid by the law of Scotland. She resides for some years without becoming domiciled in England. She then marries *H*, a Scotchman, of whom it is doubtful whether he is domiciled in England or not. She continues resident in England till her death. If *H* was at the time of the marriage domiciled in Scotland the will is valid; if he was then domiciled in England the will is revoked, *i.e.*, is invalid.<sup>3</sup>

9. *T*, an unmarried Scotchwoman domiciled in Scotland, makes a will of movables. She then marries a Scotchman domiciled in Scotland. Her husband, after the marriage, acquires an English domicile and the testatrix thereby becomes and remains domiciled in England until her death. Her will is valid.<sup>4</sup>

10. *T*, an unmarried Englishwoman, makes a will of movables whilst domiciled in England. She afterwards marries in England a Scotchman domiciled in Scotland. She dies domiciled in Scotland. Her will is valid.<sup>5</sup>

*Exception.*—A will which is invalid on account of material invalidity according to the law of the testator's domicile at the time of his death is invalid,

<sup>1</sup> Compare *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211.

<sup>2</sup> *I.e.*, the marriage of *T*, a person domiciled in England, is by the law of his then domicile revoked, and is not re-validated by his resumption of a Scotch domicile.

<sup>3</sup> *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211.

<sup>4</sup> *Re Groos*, [1904] P. 289.

<sup>5</sup> *I.e.*, is not revoked by the marriage. *Westerman v. Schwab* (1905), 13 Sc. L. T. R. 594. This result is logically justifiable. The testatrix at the moment of her marriage is domiciled in Scotland. Her will was at no assignable moment of time invalid by the law of her domicile. As long as she remained domiciled in England her will was valid, for she was unmarried. From the moment she married the will was also valid, for from the moment of marriage she was domiciled in Scotland.



although it may have been valid according to the law of the testator's domicile at the time of its execution (?).

#### Comment.

This Exception is open to some doubt, as it depends upon the interpretation to be put upon 24 & 25 Vict. c. 114, s. 3. The words of that section are very strong, and may be taken to mean that a will which would have been operative if the testator had died domiciled in the country where the will was executed shall not be rendered invalid or inoperative by any subsequent change of domicile; but probably the Act does not refer to material invalidity, and a will which is wholly or in part invalid or inoperative on account of its provisions being opposed to the law of the testator's domicile at the time of death will, since as before the Act, be in so far invalid or inoperative.

#### Illustration.

*T*, when domiciled in Ireland, executes a will bequeathing money in the funds on trusts for accumulation in excess of the periods permitted by the Thellusson Act.<sup>1</sup> This statute does not extend to Ireland, and the bequest would be valid should *T* die domiciled in Ireland. *T*, however, after the execution of his will, dies domiciled in England. Whether the will as to this bequest is or is not invalid in so far as the permitted periods are exceeded?

### (C) EXERCISE OF POWER BY WILL.<sup>2</sup>

#### (i) Capacity.

RULE 188.—A person may have capacity to exercise by will a power of appointment conferred by an English instrument, although he does not possess testamentary capacity under the law of his domicile.

<sup>1</sup> 39 & 40 Geo. III. c. 98. Conf. *Freke v. Carbery* (1873), L. R. 16 Eq. 461.

<sup>2</sup> As to Rules 188—192, and the illustrations thereof, the reader should note that:—(1) Unless the contrary is expressly stated or is apparent from the context, they refer exclusively to (a) powers of appointment created under an *English instrument*; (b) powers of appointment exercised *by will*; (c) powers in regard to *movable property*. (2) The word “exercise” is throughout employed with reference to a power; the word “execute” or “make,” with reference to a will.

The term “English instrument” in this Rule and in the following Rules means an instrument (*e.g.*, a settlement or a will) which creates a power of appointment, and operates under English law.

### Comment.

*As to power of appointment by will generally.*—Under English law a person can by an instrument, such as a marriage settlement or a will, give to some other person<sup>1</sup> a power to appoint by will the person or persons who shall succeed to movable property on the death of the person to whom the power is given. The person who thus gives or creates the power is called “the donor of the power”; the person to whom the power is given, and who therefore can exercise the power, is called “the donee of the power,” and the power is independent of any interest in the property vested in the donee of the power; the person in whose favour the power is exercised is called “the appointee.” Now the donor of the power, the donee, and the appointee may each be personally subject to the laws of different countries. The donor may be—and when, as under this Rule, we are dealing with an English instrument, generally though not invariably is—an Englishman domiciled in England; the donee may be a French citizen domiciled in France; the appointee in whose favour the power is exercised may be an American citizen domiciled in New York; and further, each one of these persons may change his domicil and nationality after the creation of the power of appointment. Hence the exercise of a power often raises questions connected with the conflict of laws. The following inquiries, among others, suggest themselves: First, by the law of what country, or more shortly, by what law, will an English Court determine the *capacity* of a donee to exercise a power of appointment by will?<sup>2</sup> Secondly, by what law will such Court determine how far a given will is a *formally valid* exercise of such power?<sup>3</sup> Thirdly, by what law will an English Court determine the *interpretation*, or—a somewhat different thing—the material validity and operation, of the exercise of such power?<sup>4</sup> It might indeed be thought that, as we are

<sup>1</sup> Or retain for himself.

<sup>2</sup> See Rule 188.

<sup>3</sup> See Rules 189, 190, pp. 691, 697, *post*.

<sup>4</sup> See Rules 191, 192, *post*.

here concerned only with the exercise of a power of appointment by will, the answer to these questions, and others of the same kind, must be the same as the answer to similar inquiries with regard to the validity, &c. of a will<sup>1</sup> of movables, and that, for instance, as the capacity of a testator to make such will is governed by the law of the country where he is domiciled, so the capacity of the donee of a power to make a will, which shall be a valid exercise of the power, must also depend upon the law of the donee's domicil. But this is not so. The making of a will, and the exercise by will of a power of appointment, are, according to English law, essentially different things. A man who makes an effective will necessarily disposes of his own property, or of property in which he has some interest. The exercise, on the other hand, of a power to appoint by will is not in strictness disposal of property belonging to the donee.<sup>2</sup> He usually has, it is true, some interest in the property in respect of which he exercises the power; but this is not necessarily the case.<sup>3</sup> Whilst, again, the making of a will is strictly an exercise of testamentary capacity on the part of the testator, the exercise of a power by will is, for many purposes at any rate, the carrying out by the donee of the power of the wishes of the donor (*e.g.*, the settlor) by whom the power is created. *T*, in short, who exercises the power of appointment, is not a testator making his own will, but rather the donor's mandatory, or agent, who, within the limits of the authority or discretion given to him, is carrying out the intentions of his principal, the donor.<sup>4</sup> These characteristics of a power of appointment by will must be borne in mind, as they account for, if they do not always justify, the anomalies of some of the rules hereinafter laid down as to the exercise of powers of appointment in connection with the conflict of laws.<sup>5</sup>

*As to capacity.*—From the nature of a power of appointment, it

<sup>1</sup> See Rules 184—187, pp. 667—680, *ante*.

<sup>2</sup> See the Wills Act, 1837, s. 27, and compare Rule 191, and p. 701, *post*.

<sup>3</sup> Thus *S* might settle property upon *A* for life, subject to a power of appointment by will on the part of *T* designating the person to whom the property should pass on the death of *A*.

<sup>4</sup> “The power given is a mandate; the moment that mandate is exercised it seems to me that the mandator's intention takes legal effect, not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will.” *In re D'Angibau* (1880), 15 Ch. D. 228, 243, judgment of Brett, L. J. See *In re Broad*, [1901] 2 Ch. 86.

<sup>5</sup> Compare Rule 189 (1) (a) and (b), and comment thereon, pp. 691, 692, *post*.

follows that the existence and the extent of a donee's capacity to exercise a power by will is governed, not by the law of the donee's domicile at the time when he makes the will, but by the law under which the instrument creating the power (*e.g.*, a settlement) was made. This law will generally (it is submitted) be the law of the donor's domicile at the time of the creation of the power.<sup>1</sup> "The distinction between power and property is well settled, and it is really not relevant to the consideration of the execution of a power to inquire whether the donee of the power can dispose of his property, unless, of course, there be absolute incapacity to execute any document arising from lunacy, or the like. Thus, it has been held by the Court of Appeal and Jessel, M.R., that an infant can exercise by deed a general power of appointment over personalty—at least, if it be not limited to himself in default of appointment (*In re D'Angibau* <sup>2</sup>)—although he can, of course, have no disposing capacity over his own property, because the authority to dispose proceeds from the donor of the power, and not from the donee. It follows, therefore, that the execution of any power of appointment validly created and given to a foreigner is in no way affected by any disability which he or she may be under to dispose of his or her own property by the laws of his or her domicile."<sup>3</sup>

#### Illustrations.<sup>4</sup>

1. *T* is the donee of a power to appoint by will. He has attained the age of 21, but is domiciled in a country according to the law whereof he remains a minor and is incapable of making a will till he attains the age of 22. He has capacity to exercise the power.<sup>5</sup>

2. *T* has, under her English marriage settlement executed before marriage, a power of appointment by will in respect of movable property in England. Up to the time of her marriage she is domiciled in England. By marriage with a Frenchman she

<sup>1</sup> "Where a power to appoint by will is created, it is to be governed by the law that applied to the original settlement, not by the law applying to the estate of the donee. Therefore, if the power was created by will, its interpretation is governed by the law of the domicile at death of the donor, not of the donee."

<sup>3</sup> Beale, *Cases on the Conflict of Laws*, p. 533.

<sup>2</sup> (1880) 15 Ch. D. 228.

<sup>3</sup> *Pouey v. Hordern*, [1900] 1 Ch. 492, 494, 495, judgment of Farwell, J.

<sup>4</sup> See especially note 2, p. 687, *ante*.

<sup>5</sup> *I.e.*, he will be held by English Courts to have the capacity.

acquires a French domicile and French nationality, which she retains till her death. She exercises the power in favour of one only of her children, and thereby bequeaths to this child a greater share of her property than she is capable of bequeathing under French law. *T* has capacity to exercise the power.<sup>1</sup>

(ii) *Formal Validity.*<sup>2</sup>

RULE 189.<sup>3</sup>—A will of movables made in exercise of a power of appointment by will conferred by an English instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good exercise of the power where the will—

(1) complies with any of the following conditions as to form (that is to say)—

(a) where the will is executed in accordance with the form required by the ordinary testamentary law of England, *i.e.* (if the will be made after the end of 1837), by the Wills Act, 1837;<sup>4</sup> or

(b) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicile;<sup>5</sup> or

[(c) where the will is executed in accordance with any form which is valid

<sup>1</sup> Compare *Pouey v Hordern*, [1900] 1 Ch. 492, and Rule 192, p. 705, *post*.

<sup>2</sup> See note 2, p. 687, *ante*.

<sup>3</sup> Westlake (4th ed.), pp. 116, 117; 1 Williams, *Executors* (10th ed.), p. 283; Foote (3rd ed.), pp. 274—278; *Tatnall v. Hankey* (1838), 2 Moore, P. C. 342; *Barnes v. Vincent* (1846), 5 Moore, P. C. 201; *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *D'Huart v. Harkness* (1866), 34 Beav. 324; 34 L. J. Ch. 311; *In re Kirwan's Trusts* (1883), 25 Ch. D. 373. See particularly App., Note 20, "Power of Appointment and the Wills Act, 1861."

<sup>4</sup> See the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), ss. 9, 10, 34; *Tatnall v. Hankey* (1838), 2 Moore, P. C. 342; *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In Goods of Huber*, [1896] P. 209.

<sup>5</sup> *D'Huart v. Harkness* (1866), 34 Beav. 324; 34 L. J. Ch. 311; *Milnes v. Foden* (1890), 59 L. J. P. D. 62; and see Rule 184, p. 667, *ante*.

under the Wills Act, 1861,<sup>1</sup> *i.e.*, where the will is valid either under Exception 1<sup>2</sup> or Exception 2<sup>3</sup> to Rule 185 or under Rule 187 (?);  
*and*

(2) is executed in accordance with the terms of the power as to execution.<sup>4</sup>

#### Comment.

The exercise of a power under an English instrument to appoint "by will" or "by will duly executed" is satisfied as to *form* by the fulfilment of two requirements. The one is that the will shall be executed in accordance with some one of the three conditions enumerated in Rule 189 (1), *i.e.*, that the will should be a document which, at any rate when the exercise of a power of appointment is concerned, English Courts admit to be a duly executed will. The other requirement is that any special terms or conditions of the power as to the execution of the will shall be followed.<sup>5</sup>

(a) Where the will is executed in accordance with the Wills Act, 1837.

A will so executed is (if the terms of the power are otherwise followed) a valid exercise of the power quite irrespective of the domicile of *T*, the testator, and though the will might not be a valid will under the law of *T*'s domicile.<sup>6</sup> This is an admitted, though now a thoroughly established, anomaly. It has been thus explained:—

"The case cited (*In the Goods of Alexander*) . . . shows that "an appointment by will executed according to the requirements

<sup>1</sup> See 24 & 25 Vict. c. 114, ss. 1, 2, and 3, and App., Note 20, "Power of Appointment and the Wills Act, 1861." See, however, *contra*, 1 Williams, Executors (10th ed.), p. 284, based upon *In re Kirwan's Trusts* (1883), 25 Ch. D. 373; and *Hummel v. Hummel*, [1898] 1 Ch. 642; but compare *In re Price*, [1900] 1 Ch. 442, 452, judgment of Stirling, J.

<sup>2</sup> See p. 673, *ante*.

<sup>3</sup> See p. 674, *ante*.

<sup>4</sup> *Barretto v. Young*, [1900] 2 Ch. 339; and conf. Rule 190, p. 697, *post*.

<sup>5</sup> See Rule 189 (2).

<sup>6</sup> *In Goods of Alexander* (1865), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In Goods of Huber*, [1896] P. 209; *Thorburn v. Merlin* (1898), W. N. 56; *In re Price*, [1900] 1 Ch. 442, 447, judgment of Stirling, J.

<sup>7</sup> (1860), 29 L. J. P. & M. 93.

“ of the power is entitled to probate, though it does not follow the formalities of the law of the domicile. The law takes a liberal view, and where the instrument creating the power directs it to be executed by will, in a particular form, a will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of the domicile. That is, where the instrument creating the power directs it to be executed by will, executed in a particular way, it may be a good will if executed in the form required, though not according to the law of the domicile.”<sup>1</sup>

In a subsequent case this exposition of the law has been formally approved. “I do not,” says Jeune, Pres., “think it is for me to criticise this exposition, still less to override it, and I cannot in the face of it hold that the will is not a due execution of the power, and refuse probate of it, because it is not made in accordance with the domicile of the testatrix.”<sup>2</sup>

(b) Where the will is executed in accordance with the law of the testator’s domicile.

The grounds on which such a will may be held a valid exercise of a power have been judicially explained. The explanation, be it noted, is given with reference to a case where a testatrix possessed under an English instrument a power of appointment “to be executed by her will in writing duly executed,” and had exercised the power by a will valid according to the law of her domicile, but not valid under or in accordance with the Wills Act, 1837.

“Here,” says Romilly, M. R., “I find this:—A sum of money is given simply to such person as [T] shall, by her last will duly executed, appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate: first, those which follow the forms required by the 1 Vict. c. 26, s. 9; and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a

<sup>1</sup> *D’Huart v. Harkness* (1865), 34 Beav. 328, *per* Romilly, M. R. Compare *In Goods of Huber*, [1896] P. 209, 213, judgment of Jeune, Pres.

<sup>2</sup> *In Goods of Huber*, [1896] P. 209, 214, judgment of Jeune, Pres.

"sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognised by the law of this country, but any will which is entitled to probate here. A power to appoint by will simply may be executed by any will which, according to the law of this country, is valid, though it does not follow the forms of the statute."<sup>1</sup>

(c) Where the will is executed in accordance with the Wills Act, 1861.

One of the principles laid down in *D'Huart v. Harkness*<sup>2</sup> is that any will is *prima facie* an exercise of a power to appoint by will which is so executed that it is entitled to probate in England.<sup>3</sup> But this principle is clearly wide enough to cover, and (it is submitted, though with some hesitation) does cover, any will which is formally valid, *i.e.*, which is entitled to probate under Lord Kingsdown's Act.

No doubt this conclusion has been disputed.<sup>4</sup> It is apparently laid down in *In re Kirwan's Trusts*,<sup>5</sup> and in this case alone, that a will which owes its validity or is entitled to probate only under the Wills Act, 1861, is not a good exercise of a power to appoint "by will," but on examination it will be found that *In re Kirwan's Trusts* does not bear out the doctrine grounded upon it. A sufficient reason in that case for the failure of the will as an exercise of the power was that it did not comply with the special terms of the power as to attestation, and the necessity for such compliance was not got rid of by the fact of the will being otherwise duly executed.<sup>6</sup>

<sup>1</sup> *D'Huart v. Harkness* (1865), 34 Beav. 324, 327, 328, judgment of Romilly, M. R. It should be noted that the testatrix in this case died before the Wills Act, 1861, came into force, and therefore the decision in the case had no reference to that Act.

<sup>2</sup> (1865), 34 Beav. 324.

<sup>3</sup> *Ibid.*

<sup>4</sup> "It has been decided . . . by the cases of *Re Kirwan's Trusts* and *Hummel v. Hummel* that a will which was only valid by virtue of 24 & 25 Vict. c. 114 [the Wills Act, 1861], is not a valid execution of a power, whether special or general, unless the will is executed in the presence of, and attested by, two witnesses as required by sects. 9 and 10 of the Wills Act." 1 Williams, Executors (10th ed.), p. 284.

<sup>5</sup> (1883), 25 Ch. D. 373.

<sup>6</sup> *In re Price*, [1900] 1 Ch. 442, places *In re Kirwan's Trusts* on its right footing. *Hummel v. Hummel*, [1898] 1 Ch. 642, professes to follow *In re Kirwan's Trusts*, but there must be some mistake in the report of *Hummel v. Hummel*. The testatrix who exercised the power was clearly not a British subject. See *In re Groos*,



## Illustrations.

1. *T* is, in favour of any husband of hers who should be living at her death, donee of a power of appointment by will signed in the presence of two credible witnesses. *T*, in 1831, whilst domiciled in England, exercises the power in favour of her husband. The will is signed in the presence of two credible witnesses. *T*, at her death in 1859, is domiciled in Scotland. Her husband survives her. The will is executed in accordance with the testamentary law of England, but not in accordance with the testamentary law of Scotland. The will is a valid exercise of the power.<sup>1</sup>

2. *T* is donee of a power of appointment by will in respect of movables situate in England. *T*, domiciled in Scotland, exercises the power by a will made in accordance with the form required by the law of England, but not in accordance with the form required by the law of Scotland. The will is executed in Scotland.<sup>2</sup> The will is a valid exercise of the power.<sup>3</sup>

3. *T*, an Englishwoman born a British subject, has power to dispose of 2,000*l.* consols in favour of such persons as she should, by will duly executed, appoint. *T* marries a Frenchman domiciled in France and thereby acquires a French domicile. Whilst domiciled in France she, in 1860, exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, but in a form valid according to the law of France. *T* dies in March, 1861,<sup>4</sup> domiciled in France. The will is a valid exercise of the power.<sup>5</sup>

4. *T*, an Englishwoman, has power to dispose of 2,000*l.* consols in favour of such persons as she should, by will duly executed, appoint. *T* is married to a British subject, and is resident but not domiciled in France. Whilst there resident, she, in 1890, exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, 1837, but

[1904] P. 269. Hence the Wills Act, 1861, s. 1, on which *In re Kirwan's Trusts* turns, could have nothing to do with the case. See App., Note 20, "Power of Appointment and the Wills Act, 1861."

<sup>1</sup> *In re Alexander* (1860), 29 L. J. P. & M. 93. The dates should be noticed. The will is made before the passing of the Wills Act, 1837, and the testatrix dies before the passing of the Wills Act, 1861, so that neither Act has any application to the case. See *In Goods of Huber*, [1896] P. 209.

<sup>2</sup> So that the Wills Act, 1861, s. 2, has no application. See Exception 2, p. 677, *ante*.

<sup>3</sup> *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90.

<sup>4</sup> The Wills Act, 1861, has no application. See sect. 5.

<sup>5</sup> Compare *D'Huart v. Harkness* (1865), 34 Beav. 324.

executed in a form which is valid according to the law of France (*lex actus*).<sup>1</sup> The will (*semble*) is a valid exercise of the power.<sup>2</sup>

5. *T* is a British subject born in a British colony, where she has her domicile of origin. She is donee of a power to dispose of 2,000*l.* consols in favour of such person as she should, by will duly executed, appoint. She acquires a domicile of choice in France, where she makes her will and where she remains domiciled till the time of her death. The will is made in accordance with the forms required by the law of the colony where *T* has her domicile of origin. The will, even if not formally valid according to French law, is (*semble*) a valid exercise of the power.<sup>3</sup>

6. *T* is a British subject born in a British colony, where she has her domicile of origin. She is the donee of a power to dispose of 2,000*l.* consols in favour of such person as she should, by will duly executed, appoint. She acquires a domicile of choice in France, where she makes her will whilst still unmarried. After she has made her will she marries a Frenchman, and thereby acquires French nationality.<sup>4</sup> The will is made in accordance with the forms required by the law of the colony where *T* had her domicile of origin, but not in accordance with the forms required by the law of France. Whether the will is a valid exercise of the power (?)<sup>5</sup>

7. *T* has a general power of appointment by will over 2,000*l.* *T* is a British subject domiciled in Italy. *T*, whilst in France, but not there domiciled, executes a holograph will valid by the law of France (*lex actus*), but not attested as required by the Wills Act, 1837, ss. 9 and 10. The will (*semble*) is a good exercise of the power.<sup>6</sup>

<sup>1</sup> See Exception 1, p. 673, *ante*, i.e., Wills Act, 1861, s. 1.

<sup>2</sup> Compare *D' Huart v. Harkness* (1865), 34 Beav. 324, with *In re Kirwan's Trusts* (1883), 25 Ch. D. 373, and 1 Williams, Executors (10th ed.), 282.

<sup>3</sup> See Exception 1, p. 673, *ante*, and the Wills Act, 1861, s. 1; as also Rule 187, p. 680, *ante*, and Wills Act, 1861, s. 3; and compare *In Goods of Alexander* (1860), 29 L. J. P. & M. 93.

<sup>4</sup> See the Naturalization Act, 1870, s. 10, sub-s. (1), and Rule 31, p. 180, *ante*.

<sup>5</sup> See the Wills Act, 1861, s. 1, and Exception 1, p. 673, *ante*; the Wills Act, 1861, s. 3, and Rule 187, p. 680, *ante*; *In Estate of Groos*, [1904] P. 269.

The will seems to be a valid will under the Wills Act, 1861, s. 1, which applies to the will of a British subject, and sect. 3, which applies (*In Estate of Groos*) to a will not only of a British subject, but of an alien. In the case, *In Goods of Alexander*, moreover, which is not affected by the Wills Act, 1861, it is apparently assumed that a change of domicile on the part of a testator after the execution of his will did not affect the validity of the testamentary execution of a power of appointment.

<sup>6</sup> This, no doubt, is inconsistent with *Hummel v. Hummel*, [1898] 1 Ch. 642. See p. 694, *ante*, and App., Note 20, "Power of Appointment and the Wills Act, 1861."

RULE 190.<sup>1</sup>—Subject to the exception hereinafter mentioned, no will which does not satisfy the requirements of Rule 189<sup>2</sup> is a valid exercise of a power of appointment by will created by an English instrument.

#### Comment.

A will is not a valid exercise of a power of appointment if the will either—

(1) Does not comply with some one of the three conditions as to form enumerated in Rule 189, under the heads (a), (b) and (c); or

(2) Does not in every other respect (subject, of course, to the Exception hereinafter mentioned) comply with the terms of the power as to the mode in which the will is to be executed, *e.g.*, the number of witnesses by which the signature of the testator is to be attested.

The combination of Rule 189 and Rule 190 leads, it should be observed, to the following result: A will, on the one hand, may be a valid will entitled to probate and yet not a valid exercise of a power to appoint by will; whilst a will, on the other hand, which is not valid as a will, and therefore not, as such, admissible to probate, may yet be a valid exercise of a power to appoint by will, and therefore in that capacity admissible to probate.<sup>3</sup>

Suppose, for example, that *T* is a French citizen domiciled in France, who under an English instrument is donee of a power of appointment by will, duly executed and attested by three witnesses. If *T* makes a will in his own handwriting and signed by himself, but unattested, the will is a valid will according to the testamentary law of France (*lex domicilii*), and therefore as a will valid in England,<sup>4</sup> but for want of attestation is not a valid exercise of the power of appointment.<sup>5</sup> If *T*, on the other hand, makes in France a will in accordance with the form required by the Wills

<sup>1</sup> *Re Daly's Settlement* (1858), 25 Beav. 456; 27 L. J. Ch. 751; *In re Kirwan's Trusts* (1883), 25 Ch. D. 373; *Barretto v. Young*, [1900] 2 Ch. 339. See App., Note 20, "Power of Appointment and the Wills Act, 1861," and the Wills Act, 1837, ss. 9 and 10.

<sup>2</sup> See p. 691, *ante*.

<sup>3</sup> *In Goods of Huber*, [1896] P. 209; *Pouey v. Hordern*, [1900] 1 Ch. 492. Compare *In re Price*, [1900] 1 Ch. 442, 447, judgment of Stirling, J.

<sup>4</sup> See Rule 184, p. 667, *ante*.

<sup>5</sup> The will falls within Rule 190, and, not being a will executed in accordance with the form required by the Wills Act, 1837, does not fall within the Exception to Rule 190.

Act, 1837, and, to make all safe,<sup>1</sup> has the will attested by three witnesses, the will, if not made in accordance with the testamentary law of France (*lex domicilii*), would as a will not be valid in England, but would be a valid exercise of the power.<sup>2</sup>

### Illustrations.

1. *T* is donee of a power of appointment by will, to be exercised in the presence of one or more witnesses. *T* is a British subject. In 1871 *T*, when in France, intending to exercise the power of appointment, makes a will in his own handwriting, which is signed by him but is unattested, and, in virtue of the power, appoints that his daughter shall succeed to a certain fund. The will is valid according to the law of France (*lex actus*), and complies therefore with one of the forms required by the Wills Act, 1861, s. 1. The will is rightly admitted to probate, *i.e.*, is formally valid, but is not a valid exercise of the power.<sup>3</sup>

2. *T*, an Englishwoman married to a British subject, has under her marriage settlement a power of appointment in respect of a trust fund. The power is to be exercised by her last will. *T*, when residing in France but domiciled in England, executes in 1856 a will which is not in the form required by the Wills Act, 1837, though it is in a form valid by the law of France. *T* dies in 1856.<sup>4</sup> The will is not a valid exercise of the power.<sup>5</sup>

3. *T*, a French citizen domiciled in France, has a power of appointment to be exercised by will attested by two witnesses. She

<sup>1</sup> *Seemle*, that the will, though made by a French citizen domiciled in France, might be a valid exercise of the power, though attested by only two witnesses. See Exception, p. 699, *post*.

<sup>2</sup> See Rule 185, p. 669, *ante*, and Rule 189 (a), p. 691.

<sup>3</sup> *In re Kirwan's Trusts* (1883), 25 Ch. D. 373. The will, though a valid will as far as form goes, does not follow the terms of the power, and it is not executed in the manner required by the Wills Act, 1837, *i.e.*, it does not come within either Rule 189, clause 2, or within the Exception to Rule 190. In other words, it falls within Rule 190, and is therefore not a good exercise of the power. If, as stated in *Re Kirwan's Trusts* (see 25 Ch. D. 379, judgment of Kay, J.), *T* at the time of executing the will was domiciled in France, it would have been formally valid without any reference to the Wills Act, 1861. See *D'Huart v. Harkness* (1865), 34 Beav. 324, and p. 694, note 1, *ante*. But even so it would not have been a good exercise of the power, as neither were the terms of the power followed nor did the Wills Act, 1837, s. 10, apply. See Exception, p. 699, *post*.

<sup>4</sup> Therefore her will does not come within the operation of the Wills Act, 1861. See Exception 1, p. 673, *ante*.

<sup>5</sup> *Re Daly's Settlement* (1858), 25 Beav. 456.

bequeaths all her property by holograph will, unattested, to certain persons. The will is well executed according to French law. It is admitted to probate. It is not a valid exercise of the power.<sup>1</sup>

*Exception.*<sup>2</sup>—A will executed in accordance with the form required by the Wills Act, 1837, is, so far as regards the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding that it shall have been expressly required, under the instrument creating the power, that a will made in exercise of such power should be exercised with some additional or other form of execution or solemnity.

#### Comment.

This Exception<sup>3</sup> is so wide in its terms that it may possibly apply to any power of appointment by will which is exercised by a will executed in accordance with the Wills Act, 1837, ss. 9 and 10, but it more probably applies only where the will is made by a person domiciled in England. It has been distinctly laid down that the provisions of sects. 9 and 10 of the Wills Act have no application to the wills of persons not domiciled in England.<sup>4</sup>

#### Illustrations.

1. *T*, domiciled in England, has, under an English settlement, a power of appointment by will duly executed and attested by

<sup>1</sup> *Barretto v. Young*, [1900] 2 Ch. 339. The will is not executed in accordance with the formalities required by the power. "The power is not framed, as in *D'Huart v. Harkness*, so as to be exercisable by the donee by her last will and testament in writing duly executed, but requires execution with special formalities which have not been observed." *Ibid.*, p. 343, per Byrne, J.

<sup>2</sup> "And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." 7 Will. IV. & 1 Vict. c. 26, s. 10.

<sup>3</sup> *I.e.*, Wills Act, 1837, s. 10.

<sup>4</sup> See *Barretto v. Young*, [1900] 2 Ch. 339, 343, judgment of Byrne, J., citing *In re Price*, [1900] 1 Ch. 442, 451. But both these cases refer to wills executed in accordance, not with the formalities required by the Wills Act, 1837, but with the formalities required by the law of the testator's domicile.

*four* witnesses. *T* exercises the power of appointment by a will in the form required by the Wills Act, 1837, executed in the presence of and attested by *two* witnesses only. The will is a good exercise of the power by virtue of the Wills Act, 1837, ss. 9 and 10.

2. The case is the same as the foregoing, except that *T* is a French citizen domiciled in France, and the will is not valid according to French law.<sup>1</sup> Whether the will is a good exercise of the power?

3. The case is the same as Illustration 2, except that *T* executes a holograph will signed by *T*, unattested by any witnesses, but valid by French law. The will is (*semble*) not a good exercise of the power.<sup>2</sup>

### (iii) Interpretation.<sup>3</sup>

RULE 191.—A general bequest contained in a will of movables is to be construed as an exercise of a general power of appointment.<sup>4</sup>

This Rule applies to such bequest in the following cases, that is to say:—

<sup>1</sup> It may follow from the consideration that the will is executed in the form required by the Wills Act that, though not valid as a will under the law of the testator's domicile, it is yet a good exercise of a power of appointment by will. See *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In Goods of Huber*, [1896] P. 209.

It should, however, be noted that in *Barretto v. Young*, [1900] 2 Ch. 339, 343, Byrne, J., distinctly lays down that "the provisions of sects. 9 and 10 of the Wills Act "have no application to wills of persons not domiciled in England," citing *In re Price*, [1900] 1 Ch. 442, 451. But both these cases refer to wills executed in accordance with the formalities required by the law of the testator's domicile; and I doubt whether they cover, as regards sects. 9 and 10, cases where a will is executed, though by a person domiciled abroad, in accordance with the Wills Act, 1837.

<sup>2</sup> This is logically right. The will cannot be a good exercise of the power of appointment, except under the Wills Act, 1837, s. 10, but then it would be necessarily an invalid will under sects. 9 and 10. This objection does not apply to a will made as in Illustration No. 2, in accordance with the forms required by the Wills Act, 1837, though the testator is domiciled in a foreign country.

<sup>3</sup> See p. 687, note 2, *ante*.

<sup>4</sup> "A bequest of the personal estate of the testator, or any bequest of the "personal property described in a general manner, shall be construed to include "any personal estate, or any personal estate to which such description shall "extend (as the case may be), which he may have power to appoint in any manner "he may think proper, and shall operate as an execution of such power, unless a "contrary intention shall appear by the will." Wills Act, 1837, s. 27 (part). Compare Westlake, s. 92, p. 117; *In re D'Este's Settlement*, [1903] 1 Ch. 898.

*Case 1.*—Where the will is executed by a testator domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will.

*Case 2.*—Where the will, whatever the domicile of the testator, shows on the face of it his intention that it shall be construed in accordance with the law of England.<sup>1</sup>

[*Case 3.*—Where the will is executed by a testator not domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will(?).]

#### Comment.

This Rule is intended to give the effect of the Wills Act, 1837, s. 27. The object of this enactment was to do away with the then existing rule of interpretation under which a “general bequest,” *e.g.*, of “all *T*’s personal estate” to *A*, was not construed and did not operate as the exercise of a general power of appointment conferred upon *T*. The reason of this was that property over which *T* had a power of appointment was not in strictness *T*’s own property. The effect of the rule established by the Wills Act, 1837, s. 27, is that such a general bequest is now construed as including all personal property, and therefore all movable property, over which *T* has a general power of appointment.<sup>2</sup> But the rule, after all, is a rule of interpretation—*i.e.*, as the Act says, it only applies “unless a contrary intention appears by the will”—and would not operate, for example, to take the simplest case, if the will were to contain the statement that the general bequest of all *T*’s personal property was not intended to include certain property over which he had a power of appointment, and the same result must, it would seem, follow if the general tenour of *T*’s will should show that a general bequest was not intended to operate as the exercise of a power of appointment.

When, however, it is established that *T*’s will contains a general bequest of *T*’s personal estate, a question, which may often be a

<sup>1</sup> *In re Price*, [1900] 1 Ch. 442. Contrast *In re D’Este’s Settlement*, [1903] 1 Ch. 898; *In re Scholefield*, [1905] 1 Ch. 408.

<sup>2</sup> Sect. 27 does not apply to a “limited” power of appointment, *e.g.*, where *T* is donee of a power of appointment, which is limited to a particular class, *e.g.*, to any of *T*’s children.

difficult one, requires an answer, namely, What are the cases in which the rule of construction contained in sect. 27 of the Wills Act, 1837, applies? The answer appears to be that it is applicable in the three cases enumerated in Rule 191 :—

*Case 1.*—Here the rule of construction laid down in Rule 191 clearly applies; for a will of movables executed by a person domiciled in England in accordance with the forms required by the Wills Act, 1837, s. 10, is the kind of will which obviously comes within the scope of the Wills Act, 1837. It is, so to speak, the normal English will, and, if no contrary intention appears by the will itself, must be construed in accordance with the rule of construction laid down by English law.

*Case 2.*—Here again it is pretty clear that our rule of construction applies. The object of construing a will is to ascertain the sense which the testator intended it to bear, and, as the will on the face of it shows or expresses the intention of the testator that it should be construed in accordance with the law of England, the rule of construction laid down by the Wills Act, 1837, s. 27, is imported into the will. True it is that a will of movables must, in general, be construed in accordance with the law of the testator's domicile at the time when it is made; but this is a mere canon of interpretation which must not be adhered to when there is any reason, from the language or the nature of the will, to suppose that the testator wrote it with reference to the law of some country other than that in which he was then domiciled.<sup>1</sup>

*Case 3.*—It is possible, though not certain, that the principle which governs Case 2 here applies. For the form of the will, especially if combined with the use of the technical terms of English law, is, or at any rate may be, a sufficient indication of the testator's intention that a general bequest contained in the will shall be construed in accordance with the rule of construction contained in the Wills Act, 1837, s. 27. Still, with regard to Case 3, one must, in the absence of conclusive decisions, speak with hesitation. The Wills Act, 1837, it may be said, does not, as regards wills of movables, apply to wills made by persons domiciled abroad, and therefore a particular section of that Act cannot of itself apply to such wills without a clear expression of the testator's intention that it shall apply. To this objection there are two replies. The first is that a will executed in accordance with the Wills Act, 1837, though not in accordance with the formalities

<sup>1</sup> *In re Price*, [1900] 1 Ch. 442, 452; and see p. 679, *ante*.



required by the law of the testator's domicile, may be a valid exercise of a power of appointment by will,<sup>1</sup> and therefore may be construed in regard to such power of appointment by the rule of construction applicable to an English will executed by a person domiciled in England. The second is that the effect of the Wills Act, s. 27, arises in this case, not from the Act itself applying to the wills of persons domiciled out of England, but from the fact that sect. 27 is, through the form in which the will is drawn, imported by the testator himself into the will as a rule of construction.

There is, be it here noted, an essential difference between the Wills Act, 1837, s. 10,<sup>2</sup> and the Wills Act, 1837, s. 27.<sup>3</sup> The application of sect. 10 to a given will in no way depends upon the intention of the testator. The section cannot, whatever the wish of the testator, make valid as an exercise of a power any will which is not executed in accordance with the formalities required by the Wills Act, 1837, and possibly does not apply even to a will executed in accordance with such formalities if it is executed by a person domiciled out of England.<sup>4</sup> Thus, if the power requires that a will should be attested by *four* witnesses, and *T*, the testator, leaves a holograph will duly signed, but unattested, the will cannot, in virtue of sect. 10, be treated as a good exercise of the power; and possibly the same result follows even if *T* leaves a will which is executed in accordance with the formalities required by the Wills Act, 1837, but is himself domiciled out of England.

Sect. 27 stands in a different position from that of sect. 10, in that it is a mere rule of construction. A testator may, by the expression of his own wish, make the rule contained in sect. 27 part of his will whatever be the form in which the will is made, and whatever be the testator's domicile at the time of his executing the will. He may, in short, either in so many words or in effect, say that the terms of a general bequest are, in his will, to be construed in accordance with the Wills Act, 1837, s. 27.

#### Illustrations.<sup>5</sup>

1. *T* is an Englishwoman domiciled in England. The will is

<sup>1</sup> See Rule 189 (1) (a), p. 691, *ante*.

<sup>2</sup> See Rule 190, p. 697, *ante*.

<sup>3</sup> See Rule 191, p. 700, *ante*.

<sup>4</sup> *Barretto v. Young*, [1900] 2 Ch. 339, 343.

<sup>5</sup> In the illustrations to this Rule it is to be assumed, unless the contrary is stated, that *T* is a woman who, under an English settlement, has a general power of appointment by will over 1,000l. consols, and that she has made a general bequest of all her personal property or all her movable property to *A*.

made in accordance with the Wills Act, 1837. The will is to be construed as an exercise of the power.

2. *T* is a French citizen domiciled in France. She executes a holograph will made in a French form and unattested. It is valid by the law of France. According to French law it would be a complete disposition of all property over which *T* has the power to dispose, but French law does not know of powers of appointment and would, under the circumstances, apply the law of England with reference to the exercise of such a power. The will contains expressions from which it may be inferred that *T* meant her will to operate in England as well as in France, and wrote it with reference to the law of England. The will is to be construed as an exercise of the power.<sup>1</sup>

3. *T*, a French citizen domiciled in France, executes a will in English complying with the requirements of the Wills Act, 1837, and expressed in the terms of English law. The will refers to a general power of appointment given under an English settlement. The will (*semble*) is to be construed as an exercise of the power.<sup>2</sup>

4. *T*, whilst a British subject domiciled in England, executes a will in accordance with the requirements of the Wills Act. *T*, after executing the will, acquires a French domicile and dies domiciled in France. *T*'s will is (*semble*) to be construed as an exercise of the power.<sup>3</sup>

5. *T*, a British subject domiciled in France, executes a holograph will unattested and valid by the law of France. *T* expresses in the will her intention that it shall be construed in accordance with the law of England. The will (*semble*) is to be construed as an exercise of the power.<sup>4</sup>

<sup>1</sup> *In re Price*, [1900] 1 Ch. 442. "I think that I am entitled [in this case] to "apply the rules of construction which would by English law be applied to a will "expressed in the same terms and of the same date as that annexed to the letters "of administration, including the rule of construction introduced by sect. 27 of the "Wills Act." *Ibid.*, p. 453, judgment of Stirling, J. See *In re Harman*, [1894] 3 Ch. 607.

<sup>2</sup> Whether it would have been a valid exercise of the power of appointment if no reference had been made thereto (?) *In re Price*, [1900] 1 Ch. 442.

<sup>3</sup> This seems to follow from the Wills Act, 1837, s. 27, taken together with the Wills Act, 1861, s. 3, and *In re Price*, [1900] 1 Ch. 442. Further (*semble*), that, assuming marriage is not under French law the revocation of a will (*In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211), *T*'s will would not have been revoked had she acquired a French domicile by marriage. See *Westerman v. Schwab* (1905), 13 Sc. L. T. R. 594.

<sup>4</sup> This seems to follow from *In re Price*, [1900] 1 Ch. 442. It is not (*semble*) inconsistent with *In re Kivran's Trusts* (1888), 25 Ch. D. 373.

6. *T*, a French subject domiciled in France, executes a holograph will in the French form and unattested. It is valid by French law. It contains no words introducing the principle of construction contained in the Wills Act, s. 27. The will (*semble*) cannot be construed as an exercise of the power.<sup>1</sup>

7. *T* is a French citizen domiciled in France. She executes a holograph will unattested, which is valid by the law of France. *T* creates her niece universal legatee of her property in England as well as in France. According to French law, the will would pass everything *T* could dispose of. The will contains no reference to the power of appointment or to the property over which *T* has a power of appointment. The will cannot be construed as an exercise of the power.<sup>2</sup>

(iv) *Material Validity.*

RULE 192.<sup>3</sup>—The operation of the exercise by will of a power of appointment, created either under an English or under a foreign instrument, depends on the law which governs the operation of the instrument, and not on the law which governs the operation of the will.

Comment.

Throughout the Rules relating to the exercise of a power of appointment by will, we have assumed that the power of appointment is created under an English instrument. Rule 192, however, applies, as far as the matter can be dealt with by an English Court, not only to a power created under an English instrument, but also to a power created under a foreign instrument. Now a bequest which is valid, or rather operative, by the law to which the donor (*e.g.*, a settlor) of a power of appointment by will was subject when he created the power, may be invalid, or rather inoperative, according to the law to which, as regards testamentary dispositions, the donee of the power (testator) is subject when he executes the power by will; and it is equally possible that a bequest

<sup>1</sup> *In re D'Este's Settlement*, [1903] 1 Ch. 898.

<sup>2</sup> *In re Scholefield*, [1905] 2 Ch. 408.

<sup>3</sup> *Pouey v. Hordern*, [1900] 1 Ch. 492; *Bald v. Bald* (1897), 66 L. J. Ch. 524; *In re Mégret*, [1901] 1 Ch. 547.

which is operative under the law which governs the testator (donee of the power) may be inoperative under the law governing the creator or donor of the power, *i.e.*, the settlor, when he made the settlement. Rule 192 lays down that English Courts will determine whether the power of appointment is operative or not, and how it operates, by reference to the law to which the settlor (donor) was subject when the power was created, and not by reference to the law to which the testator (donee) was subject when he exercised the power of appointment by making his will.

### Illustrations.

1. *T*, a domiciled Englishwoman, marries *H*, a French citizen. She is, under an English instrument, the donee of a special power of appointment over 4,000*l.* in favour of such of her children as she shall by will appoint. In exercise of such power, and by a will in a form valid by French law, she bequeaths the whole 4,000*l.* to one of several children. The bequest is operative according to English, but inoperative according to French, law. The power is well exercised and the bequest valid.<sup>1</sup>

2. In 1862, *T*, an Englishwoman, marries in England a domiciled Frenchman. Under an English instrument (the marriage settlement) she is, in respect of movable property vested in English trustees and situate in England, the donee of a general power of appointment. In 1866 she makes, in exercise of the power, an English will, duly executed in accordance with English testamentary law, but containing dispositions which are inoperative according to French law, but are operative according to English law. The will is a valid exercise of the power, and the dispositions thereof are valid.<sup>2</sup>

3. Under a Scottish instrument executed by a domiciled Scotsman, his child *T* has a power of appointment by will as to 2,000*l.* in favour of any person whom he may choose. *T* bequeaths the 2,000*l.* to *A*. Under English law such exercise of a general power of appointment makes the 2,000*l.* general assets in favour of *T*'s creditors. Under Scottish law such exercise of a power of appoint-

<sup>1</sup> *Pouey v. Hordern*, [1900] 1 Ch. 492. The principle is that the disposition of the 4,000*l.* is not in strictness the disposition of property belonging to *T*, but the execution of a power created by the settlor, and that the bequest of the whole property to one child only is legal and effective according to English law, which determines the effect of the settlement.

<sup>2</sup> *In re M'gret*, [1901] 1 Ch. 547.

ment has not this effect. The 2,000*l.* goes to the appointees, and is not assets for the benefit of the creditors.<sup>1</sup>

<sup>1</sup> *Bald v. Bald* (1897), 66 L. J. Ch. 524. Note that here the principle is the same as in the other cases. The power is created by a domiciled Scotsman (donor). It is exercised by a domiciled Englishman (donee). The effect of this exercise, or, in other words, whether the property subject to the power goes to *T*'s creditors or to the appointee under the power, is to be determined by Scottish law, *i.e.*, by the law under which the power was created, and not by English law, *i.e.*, the law under which the power is exercised.

## CHAPTER XXXII.

PROCEDURE.<sup>1</sup>

RULE 193.<sup>1</sup>—All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest, the term “procedure” is to be taken in its widest sense, and includes (*inter alia*)—

- (1) remedies and process;
- (2) evidence;
- (3) limitation of an action or other proceeding;
- (4) set-off or counter-claim.

## Comment.

The principle that procedure is governed by the *lex fori* is of general application and universally admitted, but the Courts of any country can apply it only to proceedings which take place in, or at any rate under the law of, that country. In a body of Rules, therefore, such as those contained in this Digest, which state the principles enforced by an English Court, the maxim that procedure is governed by the *lex fori* means in effect that it is governed by the ordinary law of England, without any reference to any foreign law whatever. The maxim is in fact a negative rule; it lays down that the High Court, in common, it may be added, with every other English Court, pursues its ordinary practice and adheres to its ordinary methods of investigation whatever be the character of the parties, or the nature of the cause which is brought before it.

<sup>1</sup> Story (7th ed.), ss. 556—583; see also chap. xvii.; Westlake, chap. xviii.; Foote, chap. x.; Nelson, p. 424.

The decree of a foreign Californian Court cannot authorise a person to sue in an English Court otherwise than in accordance with the English rules of procedure. *Barber v. Mexican Land Co.* (1900), 48 W. R. 235.

"A person," it has been said, "suing in this country, must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to,"<sup>1</sup> and the foreign defendant, it may be added, is to have the advantages, if any, which the form of procedure in this country gives to every defendant.

Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case.

"The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced must be determined by the *lex fori*,—the law of the country to the tribunals of which the appeal is made,"<sup>2</sup>—but that whatever relates to the rights of the parties must be determined by the proper law of the contract or other transaction on which their rights depend.

Our Rule is clear and well established. The difficulty of its application to a given case lies in discriminating between matters which belong to *procedure* and matters which affect the *substantive rights* of the parties. In the determination of this question two considerations must be borne in mind:—

*First.* English lawyers give the widest possible extension to the meaning of the term "procedure." The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice; it includes the whole law of evidence, as well as every rule in respect of the limitation<sup>3</sup> of an action or of any other legal proceeding for the enforcement of a right, and hence it further includes the methods, *e.g.*, seizure of goods or arrest of person, by which a judgment may be enforced.

*Secondly.* Any rule of law which solely affects, not the *enforcement* of a right, but the *nature* of the right itself, does not come

<sup>1</sup> *De la Vega v. Vianna* (1830), 1 B. & Ad. 284, 288, judgment of Tenterden, L. J.

<sup>2</sup> *Don v. Lippmann* (1837), 5 Cl. & F. 1, 13, *per* Lord Brougham.

<sup>3</sup> See *contra*, Savigny, s. 374 (Guthrie's transl.), pp. 249, 267—272; Bar (Gillespie's transl.), pp. 624—627.

under the head of procedure. Thus, if the law which governs, *e.g.*, the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it affects the rights of the parties to the contract, and not the remedy for the enforcement of such rights.

Hence any rule limiting the time within which an action may be brought, any *limitation* in the strict sense of that word, is a matter of procedure governed wholly by the *lex fori*. But a rule which after the lapse of a certain time extinguishes a right of action—a rule of *prescription* in the strict sense of that word—is not a matter of procedure, but a matter which touches a person's substantive rights, and is therefore governed, not by the *lex fori*, but by the law, whatever it may be, which governs the right in question. Thus if, in an action for a debt incurred in France, the defence is raised that the action is barred under French law by lapse of time, or that for want of some formality an action could not be brought for the debt in a French Court, the validity of the defence depends upon the real nature of the French law relied upon. If that law merely takes away the plaintiff's *remedy*, it has no effect in England. If, on the other hand, the French law extinguishes the plaintiff's *right* to be paid the debt, it affords a complete defence to an action in England.<sup>1</sup>

To this it must be added that an English statutory enactment, which affects both a person's right and the method of its enforcement, establishes a rule of procedure and therefore applies to an action in respect of a right acquired under foreign law. Hence the 4th section of the Statute of Frauds,<sup>2</sup> and the 4th section of the Sale of Goods Act, 1893, which, whether affecting rights or not, certainly affect procedure,<sup>3</sup> apply to actions on contracts made in a foreign country and governed by foreign law. Whence the conclusion follows that a contract though made abroad, which does not satisfy the provisions of the 4th section of the Statute of Frauds, or of the Sale of Goods Act, 1893, respectively, cannot be enforced in England.

With regard to the Illustrations to this Rule it must always be borne in mind that, as we are dealing with proceedings before an English Court, the *lex fori* is the same thing as the law of England.

<sup>1</sup> See Intro., General Principle No. I., p. 23, *ante*.

<sup>2</sup> *Leroux v. Brown* (1852), 12 C. B. 801. The Statute of Frauds, s. 7, relates to procedure, and applies to proceedings having reference to foreign land. *Rochevoucauld v. Boustead*, [1897] 1 Ch. (C. A.) 196.

<sup>3</sup> *Jones v. Victoria Graving Co.* (1877), 2 Q. B. D. 314, 323, language of Lush, J.



## Illustrations.

*Lex Fori governs Procedure.*(1) *Remedies and Process.*

1. *A* brings an action against *X* for breach of a contract made with *X* in Scotland as a member of a Scotch firm. According to the law of Scotland (*lex loci contractus*), *A* could not maintain an action against *X* until he had sued the firm, which he has not done. According to the law of England (*lex fori*), the right to bring an action against the member of a firm does not depend upon the firm having been first sued. *A* can maintain an action against *X*.<sup>1</sup>

2. *A*, a Portuguese, at a time when arrest of a debtor on mesne process is allowable under the law of England (*lex fori*), but is not allowable under the law of Portugal (*lex loci contractus*), brings an action against *X*, a Portuguese, for a debt contracted in Portugal. *A* has a right to arrest *X*.<sup>2</sup>

3. *X*, residing in Denmark, promises to marry *A*, who is residing in England. *X* refuses in England to marry *A*. Under the law of Denmark no action can be brought for breach of promise of marriage except in circumstances which do not exist in this case. The law of Denmark affects only remedy for breach of contract and does not affect existence of contract. *A* brings an action against *X*. The action lies.<sup>3</sup>

4. *A*, in Spain, sells *X* goods of the value of 50*l*. The contract is made by word of mouth, and there is no memorandum of it in writing. The contract is valid and enforceable according to Spanish law (*lex loci contractus*). A contract of this description is, under the Sale of Goods Act, 1893, s. 4 (*lex fori*), not enforceable by action. *A* cannot maintain an action against *X* for refusal to accept the goods.<sup>4</sup>

<sup>1</sup> *Bullock v. Caird* (1875), L. R. 10 Q. B. 276.

<sup>2</sup> *De la Vega v. Vianna* (1830), 1 B. & Ad. 284, with which contrast *Melan v. Fitzjames* (1797), 1 B. & P. 138.

<sup>3</sup> *Hansen v. Dixon* (1906), 23 T. L. R. 56. In the circumstances of the case, it was held that the contract was an English contract, but it was also laid down that even if the contract was a Danish contract the law of Denmark affected only the remedy for breach of the contract, and an action for such breach was maintainable in England.

<sup>4</sup> See *Acebal v. Levy* (1834), 10 Bing. 376, and note that the Sale of Goods Act, 1893, s. 4, differs in wording from the Statute of Frauds, s. 17. The Sale of Goods Act, 1893, s. 4, enacts that no contract which comes within it "shall be enforceable by action." The Statute of Frauds, s. 17, enacted that no contract which comes within it "shall be allowed to be good," but even this enactment probably referred to procedure. Contrast, however, *Story*, ss. 262, 262a.

It is a curious question how far the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62),

5. *A* brings an action against *X* to obtain specific performance of a contract made between *A* and *X* in and subject to the law of a foreign country. The contract is one of which *A* might, according to the law of that country (*lex loci contractus*), obtain specific performance, but it is not one for which specific performance can be granted according to the law of England (*lex fori*). *A* cannot maintain an action for specific performance.

(2) *Evidence.*

6. *A* brings an action against *X* to recover a debt incurred by *X* in and under the law of a foreign country (*lex loci contractus*). *A* tenders evidence of the debt which is admissible by the law of the foreign country, but is inadmissible by the law of England (*lex fori*). The evidence is inadmissible.<sup>1</sup>

7. *A* brings an action against *X*, an Englishman, for breach of a promise of marriage made by *X* to *A*, a German woman, at Constantinople. *A* has not such corroborative evidence as is required by 32 & 33 Vict. c. 68, s. 2 (*lex fori*). *A* cannot prove the promise or maintain the action.<sup>2</sup>

8. *A*, a Frenchman, makes a contract in France with *X*, an Englishman, to serve him in France from a future date for a year certain. The contract is made by word of mouth, and there is no memorandum of it in writing. It is a contract valid by the law of France (*lex loci contractus*), for the breach of which an action might be brought in a French Court, but under the 4th section of the Statute of Frauds no action can be brought on such an agreement unless there is a memorandum thereof in writing. The enactment applies to procedure. *A* cannot maintain an action in England against *X* for breach of the contract.<sup>3</sup>

(3) *Limitation.*

9. *X* contracts a debt to *A* in Scotland. The recovery of the debt is not barred by lapse of time, according to Scotch law (*lex*

applies to procedure. If the words of the Act are to be strictly construed, it would seem that the 1st section does not, whilst the 2nd section does, touch procedure. Probably, however, each section is intended to establish a rule of procedure, and therefore affects the enforceability of any contract, wherever made or by whatever law it is governed, coming within the section.

<sup>1</sup> *Brown v. Thornton* (1837), 6 A. & E. 185. Compare *Finlay v. Finlay* (1862), 31 L. J. P. & M. 149.

<sup>2</sup> *Wiedemann v. Walpole*, [1891] 2 Q. B. (C. A.) 534.

<sup>3</sup> Conf. *Leroux v. Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1.

*lori contractus*), but it is barred by the English Limitation Act, 1623, 21 Jac. I. c. 16 (*lex fori*). *A* cannot maintain an action against *X*.<sup>1</sup>

10. *X* incurs a debt to *A* in France. The recovery of such a debt is barred by the French law of limitation (*lex loci contractus*), but is not barred by any English Statute of Limitation. *A* can maintain an action for the debt against *X*.<sup>2</sup>

11. *A* in a Manx Court brings an action against *X* for a debt incurred by *X* to *A* in the Isle of Man. The action, not being brought within three years from the time when the cause of action arose, is barred by Manx law, and judgment is on that account given in favour of *X*. *A* then, within six years from the time when the debt is incurred, brings an action against *X* in England. This action is not barred by the English Limitation Act, 1623 (*lex fori*). *A* can maintain his action against *X*.<sup>3</sup>

12. *X*, under a bond made in India, is bound to repay *A* 100*l*. Specialty debts have, under the law of India (*lex loci contractus*), no higher legal value than simple contract debts, and under that law the remedy for both is barred by the lapse of three years. The period of limitation for actions on specialty debts is, under the law of England,—3 & 4 Will. IV. c. 42, s. 3 (*lex fori*),—twenty years. *A*, ten years after the execution of the bond, brings an action in England upon it against *X*. *A* can maintain the action.<sup>4</sup>

#### (4) *Set-off*.

13. *X* in 1855 contracts in Prussia with *A* for the carriage by *A* of goods by sea from Memel to London. *A* brings an action against *X* for the freight, and *X* under Prussian law (*lex loci contractus*) claims to set off money, due to him by way of damages from *A*, which could not at that date be made, according to the rules of English procedure (*lex fori*), the subject either of a set-off or a counter-claim. *X* is not allowed to set off, against the money due to *A*, the damages due from *A* to *X*.<sup>5</sup>

<sup>1</sup> *British Linen Co. v. Drummond* (1830), 10 B. & C. 903.

<sup>2</sup> *Huber v. Steiner* (1835), 2 Scott, 304. Compare *Don v. Lippmann* (1837), 5 Cl. & F. 1; *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121; *Ruckmaboye v. Mottichund* (1852), 8 Moore, P. C. 4.

<sup>3</sup> *Harris v. Quine* (1869), L. R. 4 Q. B. 653. See, as to the judgment, p. 417, *ante*.

<sup>4</sup> *Alliance Bank of Simla v. Carey* (1880), 5 C. P. D. 429. Whether this case is rightly decided?

<sup>5</sup> *Meyer v. Dresser* (1864), 16 C. B. N. S. 646; 33 L. J. C. P. 289. Contrast *MacFarlane v. Norris* (1862), 2 B. & S. 783. Since the Judicature Acts came into

*Lex Fori does not Govern Existence of Right.*

14. *A* brings an action on a contract made by word of mouth between *X* and *A* in and under the law of a foreign country. It is a kind of contract which under the law of England (*lex fori*) is valid though not made in writing, but under the law of the foreign country (*lex loci contractus*) is void if not made in writing. *A* cannot maintain his action, *i.e.*, the validity of the contract is governed in England, not by the *lex fori*, but by the *lex loci contractus*.<sup>1</sup>

15. *A* brings an action against *X* for breach of a contract made in a foreign country. It is proved that under the law of that country (*lex loci contractus*) the contract for want of a stamp is unenforceable. If the want of the stamp merely deprives *A* of his remedy in the foreign country, then he can maintain an action in England for breach of the contract, *i.e.*, the want of the stamp merely affects procedure which is governed by the *lex fori*. If the want of the stamp makes the contract void *ab initio*, then *A* cannot maintain an action in England, *i.e.*, the want of a stamp affects a matter of right and is governed by the *lex loci contractus*.<sup>1</sup>

16. *X* in 1866 commits an assault upon *A* in Jamaica. For some time after the assault is committed, *A* might, had *X* been in England, have maintained an action for it there against *X*. Before *X* returns to England the legislature of Jamaica passes an Act of Indemnity under which the assault is made lawful. *X* then returns to England, and *A* brings an action against *X* for the assault. *A* cannot maintain the action, *i.e.*, the character of the act done by *X*, or *A*'s right to treat it as a wrong, is governed, not by the *lex fori*, but by the *lex loci delicti commissi*.<sup>2</sup>

force, the value of the goods not carried could (*seem*) be claimed under a counter-claim. Conf., also, *Allen v. Kemble* (1848), 6 Moore, P. C. 314 (as explained in *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525, 540, 541); *Maspons v. Mildred* (1882), 9 Q. B. D. (C. A.) 530; (1883) 8 App. Cas. 874.

<sup>1</sup> Compare *Bristow v. Sequeville* (1850), 5 Ex. 275; 19 L. J. Ex. 289.

<sup>2</sup> See *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1 (Ex. Ch.).

Whether action would have been maintainable if *X* had returned to England and *A* had commenced the action, but not brought the case to trial, before the passing of the Jamaica Act of Indemnity? Compare pp. 653, 654, *ante*.

## APPENDIX.

### NOTE 1.

#### MEANING OF "LAW OF A COUNTRY," AND THE DOCTRINE OF THE *RENOI*<sup>1</sup>.

My aim in this note is first to insist, in connection with the meaning given by English Courts to the term "law of a country," that they do virtually accept the doctrine of the *renvoi*; and, next, to show the way in which this doctrine can be and generally is applied by an English Court to a given case. With the inquiry whether English Courts act wisely or unwisely, logically or illogically, in accepting the doctrine of the *renvoi* I have, in this note, no concern whatever.

#### (A.) *Meaning of "Law of a Country."*

My contention is that, in any English rule of private international law, the term "law of a country," which is admittedly ambiguous, means, as applied to a foreign country, *e.g.*, Italy,<sup>2</sup> any principle or law, whether it be the local law of Italy or not, which the Courts thereof apply to the decision of the case to which the rule refers. This assertion is equivalent to the statement made by other writers, that where English Courts determine a case with reference to the law of a foreign country they take into account the whole law of that country,<sup>3</sup> including the rules of private international law maintained

<sup>1</sup> See pp. 5—7, 79—81, *ante*; J. Pawley Bate, "Notes on the Doctrine of *Renvoi*"; Westlake (4th ed.), ch. ii.

<sup>2</sup> It is convenient to exemplify the points under discussion by referring to the law of Italy as the law of the foreign country which English Courts follow, but, of course, what is true of Italy holds good *mutatis mutandis* of the law of any other foreign country, the law whereof English Courts hold applicable to the decision of a given case, *e.g.*, the distribution of the goods left in England by an intestate dying domiciled in a foreign country.

<sup>3</sup> "I conclude with the opinion, as founded in reason, that a rule referring to a "foreign law should be understood as referring to the whole of that law, necessarily including the limits which it sets to its own application, without a regard to which it would not be really that law which was applied. It is also the "only opinion accepted in the English judgments, and is at least strongly supported on the continent."—Westlake, p. 40.

by its tribunals, and that English Courts have always virtually accepted what is now known as the doctrine of the *renvoi*, using that term in its widest sense. An illustration explains my meaning: Our Courts admittedly adhere<sup>1</sup> to the rule that where *D* dies intestate leaving movable property in England, but domiciled in Italy, the distribution of such movable property must be governed by the "law of Italy." My position is that in this rule the "law of Italy" means any law or principle whatever which Italian Courts hold applicable to *D*'s case:<sup>2</sup> *D*, we will take it, is an Englishman, *i.e.*, a British subject born in England of English parents, with an English domicile of origin. If, because of *D*'s nationality, Italian Courts hold that his movable property ought to be distributed in accordance with the local law of England, an English Court will distribute such property in accordance with the Statute of Distributions. If, on the other hand, Italian Courts, on whatever ground, hold that *D*'s movable property should be distributed in accordance with the local law of Italy, then again an English judge will distribute *D*'s movable property in accordance with Italian local law. An English Court or judge, in short, will attempt to distribute *D*'s movable property in England exactly as an Italian judge would, in the circumstances of *D*'s case, distribute such portion of *D*'s property as, being situated in Italy, came under the actual control of the Italian tribunal. The view opposed to mine is, as I understand the matter, that in the rule to which I have referred, the law of the deceased's domicile, or, to take *D*'s particular case, the "law of Italy," means, or ought to mean, the local or territorial law of Italy.<sup>3</sup>

The reasons for contending that English Courts put upon the term "law of a country" the meaning I have assigned to it, and thus have virtually adopted the doctrine of the *renvoi*, may be thus summed up:

(1) The authorities are strong to show that English Courts have generally, if not invariably, meant by the law of a foreign country, the whole law of that country.<sup>4</sup> Each of the cases referred to in support of this statement may be open to minute criticism, but their general tendency is unmistakable.<sup>5</sup>

<sup>1</sup> See Rule 183, p. 664, and compare Rule 182, p. 661, *ante*.

<sup>2</sup> See p. 79, *ante*.

<sup>3</sup> My friend Mr. Pawley Bate, in his very learned and interesting "Notes on the Doctrine of *Renvoi*," maintains, if I understood him rightly, that English Courts may still, without departing from any principle they have adopted, distribute *D*'s goods in accordance with the local law of Italy, even though an Italian judge would, on account of *D*'s nationality, distribute them in accordance with the local or territorial law of England. (See Pawley Bate, p. 9.)

<sup>4</sup> See *Collier v. Rivaz* (1841), 2 Curt. 855; *Maltass v. Maltass* (1844), 1 Rob. 67; *Frere v. Frere* (1847), 5 Notes of Cases, 593; *Bremer v. Freeman* (1857), 10 Moo. P. C. 306, 374; *Crookenden v. Fuller* (1859), 1 Sw. & Tr. 441; 29 L. J. P. & M. 1; *In Goods of Laeroix* (1877), 2 P. D. 94; *In re Trufort* (1887), 36 Ch. D. 600; *Armitage v. Attorney-General*, [1906] P. 135.

<sup>5</sup> This is what Mr. Pawley Bate denies: "English law . . . cannot be said to

Consider particularly *Collier v. Rivaz*<sup>1</sup> and the language of Sir H. Jenner in his judgment thereon. *D*, a British subject, died domiciled in Belgium. He left testamentary documents executed by him in accordance with the forms required by English law, but not in accordance with the forms required by the local law of Belgium, that is, not in accordance with the local law of the country where he was domiciled. It was proved, however, that in the position of *D*, the testator, who was not a Belgian subject, these testamentary documents would be considered valid, that is, their validity would be upheld by the Courts of Belgium if these Courts were called upon to decide the matter. Sir H. Jenner thereupon gave judgment in favour of the validity of the will, *i.e.*, admitted it to probate, on the plain ground that "the Court sitting here decides [the case] from the evidence of persons skilled in [Belgian] law and *decides it as it would if sitting in Belgium.*"<sup>2</sup> This doctrine he states more fully as follows:—

"The question, however, remains to be determined, whether these codicils which are opposed are executed in such a form as would entitle them to the sanction of the Court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow, that [*D*] being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native-born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and the subject of another country; and the Court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case."<sup>3</sup>

The words I have purposely italicised go to the root of the whole matter. An English Court called upon to determine the succession to the movables of a person dying domiciled in a foreign country (*e.g.*, Belgium) must decide the matter before it as it would if sitting in Belgium, *i.e.*, as if it were a Belgian Court; but this result cannot by

"have either accepted or repudiated the Renvoi-theory in general. In a few cases it has, indeed, given answers favourable to the theory, . . . but it will be seen that they can fairly be described as special cases, not justifying any general statement."—Pawley Bate, p. 9.

<sup>1</sup> (1841), 2 Curt. 855.

<sup>2</sup> 2 Curt. 863.

<sup>3</sup> *Ibid.*, pp. 858, 859.

any possibility be obtained if the English Court does not take into account the rules of private international law maintained by Belgian tribunals. Let me illustrate the point from *Collier v. Rivaz*. If in that case an English Court had held that the validity of a will made by an Englishman domiciled in Belgium must be determined in accordance with the ordinary local law of Belgium applicable to Belgian subjects, when a Belgian Court would have held that its validity must be determined in accordance with the law, not of Belgium, but of England, it is clear that the English Court would not have acted as if it had been sitting in Belgium or, in other words, had been a Belgian Court.

Take, again, *In Goods of Lacroix*. It was there in substance held by Sir J. Hannen that in the Wills Act, 1861 (Lord Kingsdown's Act), the "law of the place where a will was made" means the law which the Courts of such country hold applicable to the particular case. "If evidence," he says, "can be offered to the Court that by the law of France [where the will was made] it is permitted to a foreigner in France to make his will according to the form required by the law of his country [England] as to the execution of wills there, and that a will so made would be deemed by the French Courts to be good and valid, and would be carried into execution by them, this application [for a grant of probate] may be renewed, as it would then appear that the will . . . [was] valid, as having been made in the form permitted by the law of France in the case of British subjects in France. . . . If the evidence I have suggested can be obtained it will be open to the applicant to contend, and I think successfully, that [the will is] . . . made in accordance with the form required by the law of the place where [it was] made, and must therefore be held to be well executed for the purpose of being admitted to probate in England under 24 & 25 Vict. c. 114."<sup>1</sup> The evidence required having been obtained, the will was admitted to probate.

The later case, *In re Trufort*,<sup>2</sup> has no reference to the Wills Act, 1861, but it illustrates the same principle. The point to be determined was the distribution of the property of a Swiss citizen who died domiciled in France. In such a matter French law admits the authority of the law of Switzerland, as being the law of the nation to which the deceased belonged. There had been delivered in Switzerland a judgment determining the succession to his movable property. Stirling, J., treated this judgment as binding upon an English Court. "The claim," he laid down, "of the party litigating in this Court has been actually raised and decided in the Courts which, according to

<sup>1</sup> *In Goods of Lacroix* (1877), 2 P. D. 94, 96, 97, judgment of Sir J. Hannen, Pres.

<sup>2</sup> (1887), 36 Ch. D. 600.



"the law of the testator's domicile [France] were the proper and "competent tribunals to decide on their [*sic*] rights. . . . I am "bound by their decision."<sup>1</sup> Here, surely, we have a full admission of the principle for which I am contending. English Courts determine the distribution of *D*'s goods in England according to the law of *D*'s domicile (France), but the law of France holds that the distribution of *D*'s movables must be referred to the law of Switzerland. An English judge therefore sees that *D*'s movables are distributed in accordance not with the territorial law of France, but in accordance with the body of law, in the particular instance the law of Switzerland, which French Courts hold applicable to the case, or, in other words, an English judge, in applying the law of *D*'s French domicile, takes into account the whole of French law, and among other things, the rule of French private international law, that *D*'s movables must be distributed in accordance with the law of the country, in this instance Switzerland, to which a man belongs by nationality.<sup>2</sup>

(2) The foregoing cases deal rather with jurisdiction than with choice of law. This point is noticeable. In truth, the acceptance of the doctrine of *renvoi* by English Courts is most intimately connected with their theories as to jurisdiction. Once admit that the Courts of a particular country, *e.g.*, Italy, have primary jurisdiction over a particular case, and it almost inevitably follows that when the Courts of any other country, *e.g.*, England, are called upon to determine such a case, they must try to decide it as an Italian Court would decide it; but if an English Court has to decide a case as if it were sitting in Italy, it follows that the English Court must take account of the whole law of Italy, including Italian rules of private international law.

(3) We reach the same result if, looking at the matter under discussion from another point of view, we consider the two courses which, under our law, are open to an English Court, or to the personal representatives of the deceased, when called upon to distribute the movable property in England of a person dying domiciled abroad, *e.g.*, in Italy.<sup>3</sup> The Court may either hand over the distributable residue to the personal representative of the deceased under the law of his domicile, and leave to such representative the distribution thereof among the beneficiaries, or the Court may determine for itself who

<sup>1</sup> *Ibid.*, p. 612.

<sup>2</sup> This case illustrates the fact that where English Courts hold that a question must be determined in accordance, *e.g.*, with the law of Italy, the term *renvoi* includes two different things:

(1) The sending back by Italian law, or Courts, of the question for decision by the law of England (*renvoi* or remittal).

(2) The sending over of the question for decision by the law of some country which is neither England nor Italy, *e.g.*, Switzerland (*renvoi* or transmission).

Whether the *renvoi* be used in the one sense or the other, the aim of the English Court is to apply the law which Italian Courts hold applicable to the case.

<sup>3</sup> See Rule 182, p. 661, and pp. 662, 663, *ante*.

are the persons entitled under the law of the deceased's domicile to succeed to such distributable residue, and, having determined this point, distribute it among the persons thereto entitled in accordance with such law. Whichever course is adopted, the aim of the Court is to attain the same end; *i.e.*, the distribution of the deceased's property in accordance with the law of his domicile. Where the Court pursues the first course, and hands over the deceased's movable property to the persons representing him under the law of his Italian domicile, it is clear that such representatives must distribute it in accordance with whatever principles Italian law or, in other words, Italian Courts, may hold applicable to the case, including Italian rules of private international law. But when the English Court pursues the second course, and itself undertakes the duty of distributing the deceased's property, the Court intends to distribute the property in the same way in which it would be distributed had the property been handed over to the representative of the deceased under the law of Italy, *i.e.*, the English Court must distribute it in accordance with any principle, including Italian rules of private international law, which Italian tribunals deem applicable to the case.

(4) The soundness of the view I am maintaining is, it is submitted, confirmed by, or rather implied in the fact that our Courts treat as decisive and hold themselves bound by a judgment pronounced by the Courts of a country where a person dies domiciled as to succession to his movable property.<sup>1</sup>

(B.) *Application of principle to given case.*

How, on the principle contended for in this note, would an English Court deal with the following case?

*D* is an Englishman; he is a British subject born in England, and has an English domicile of origin. He acquires an Italian domicile, and dies intestate domiciled in Italy. He leaves a large amount of movable property in England in the shape of money deposited at an English bank. *D*'s personal representatives apply to the High Court for directions as to the distribution of *D*'s English movable property. It is admitted on all hands that such movable property must be distributed in accordance with the law of *D*'s domicile at the time of his death, *i.e.*, of Italy. We may, for the present purpose, assume that if such distribution follows the rules of Italian law, the case falls within the preliminary provisions of the *Codice Civile*, Art. 7. This in effect provides, subject to limitations with which we need not concern ourselves,

<sup>1</sup> *In re Trufort* (1887), 36 Ch. D. 600; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301. Conf. Westlake, p. 104.

that the distribution of *D*'s property is governed by the law of the nation to which *D* their owner belonged.<sup>1</sup> Now here, be it noted, that as the English Court ought in this matter to act "as if it were a Court sitting in Italy," the duty<sup>2</sup> and the sole<sup>3</sup> duty of an English judge (whether the duty be hard or easy to perform) is to ascertain the meaning of that part of Italian law which Italian tribunals deem applicable to *D*'s case. The provisions, however, of the Italian Code are ambiguous.

1st. Art. 7 may, as interpreted by the Italian Courts, mean that *D*'s property is to be distributed in accordance with the local or territorial law of England. If this is the meaning of the Article, an English Court can have no difficulty in giving effect to it. It will distribute *D*'s property in accordance with the Statute of Distributions.

2nd. Art. 7 may, as interpreted by the Italian Courts, mean that (the whole law of England, including English rules of private international law, being taken into consideration) *D*'s property should be distributed in accordance with the local law of his Italian domicile. If this be the ascertained meaning of the Italian Code, as interpreted by the Italian Courts, an English judge is under no difficulty whatever. It matters not to him whether the construction which is placed by Italian Courts upon the Italian Code is logical or illogical. In the supposed circumstances, English Courts and Italian tribunals hold, though it may be on different grounds, that succession to the movables of the deceased is governed by the ordinary territorial law of Italy.

Here however, it is argued, we are met by an insuperable difficulty. English Courts, on the one hand, hold that succession to *D*'s property must be governed by the law of *D*'s domicile (Italy), *i.e.*, by the whole law of Italy, including Italian rules of private international law, and Italian tribunals, on the other hand, that it must be governed by the law of the country to which *D* belonged by nationality (England), *i.e.*, by the whole law of England, including English rules of private international law. Hence arises, it is said, a sort of game of legal battledore and shuttlecock, the case being eternally passed backwards and forwards by the Courts of England and of Italy for decision by the law of the other country, whence the

<sup>1</sup> "Art. 7. I beni mobili sono soggetti alla legge della nazione del proprietario, salvo le contrarie disposizioni della legge del paese nel quale si trovano.

"I beni immobili sono soggetti alle leggi del luogo dove sono situati."

(Conf. Arts. 6 and 9.)

<sup>2</sup> Assuming of course that there is nothing in the rules of Italian law governing the succession to an Englishman who dies intestate domiciled in Italy, which is prohibited by the law of England.

<sup>3</sup> *I.e.*, it is his duty to ascertain what the rules of Italian law embodied in the Italian Code do mean, as interpreted by Italian Courts, without troubling himself with any question as to what they ought to mean. Contrast Westlake, pp. 30—36.

effect that the case admits of no decision whatever. The plausibility of this paradox arises from the omission to consider that all which an English judge needs to do is to ascertain as a matter of fact what is the law of Italy with regard to the movables of a deceased person in the position of *D*, and then deal exactly as an Italian judge sitting in an Italian Court would deal with them. If *D* leaves movable property in Italy there is obviously no difficulty in ascertaining on what principle Italian Courts in fact deal with such property. But even if *D* has left no property there, it can hardly be impossible to ascertain how the Italian Courts would have dealt with property that he might have left in Italy; the difficulty, great or small—and it sometimes may be considerable—is simply that of ascertaining what is the law of a foreign country on a point which admits of difference of opinion.

3rd. It is possible that the meaning of Art. 7 is that the Italian Courts decline to exercise jurisdiction in respect of the movable property of a man dying domiciled in Italy, but not possessing Italian nationality. This is possible, but in the highest degree unlikely.<sup>1</sup>

Assume, however, that the meaning of the Italian Code, as interpreted by Italian Courts, is that in the case under consideration the Italian Courts must decline to exercise jurisdiction. There is no doubt that a real difficulty then arises. An English Court might, in this case, apply its own principle in one of two ways. It might, the matter being referred back to the decision of an English Court, hold that *D* being in fact domiciled in Italy, and the Italian Courts declining to have anything to do with the matter, his property should be distributed in accordance with the territorial law of Italy, and this probably might be the best solution. The English Court might, however, hold that, as the Courts of the domicile would decide nothing, *D*'s movables in England should be distributed in accordance with the law of the domicile last possessed by *D* before settling in Italy. This apparently was the course intended to be taken in the Maltese case,<sup>2</sup> but it is not a satisfactory one. The plain truth is, that, independently of speculative questions about the doctrine of *renvoi*, or the

<sup>1</sup> I refer to the possibility, because it seems to be contemplated in *Roberts v. Attorney-General, In re Johnson*, [1903] 1 Ch. 821, and to form one of the grounds of decision in that case. There was, however, no good reason for supposing that the Baden Court "in effect disavowed [the deceased] and disclaimed jurisdiction." (*Ibid.* p. 828.) In this instance it would appear that the deceased did leave property in Baden. If the English Court had pressed its inquiries a step further than it did, and obtained information as to the way in which the Baden Court did deal with the movable property of the deceased which was situate in Baden, the English Court, acting on the principle that it ought to act as though it were a Court sitting in Baden, might, without difficulty, have distributed the movables in England in the same way in which the movables in Baden were distributed.

<sup>2</sup> *Re Johnson*, [1903] 1 Ch. 821, 822.

meaning of the term "law of a country," problems<sup>1</sup> hard to solve will inevitably arise as long as the Courts of many countries hold that a man's personal law is determined by his nationality, whilst the Courts of many other countries hold that his personal law is determined by the law of his domicile.

The principles laid down in this Note hold good in cases which have no reference whatever to succession, *e.g.*, to cases with regard to the validity of a divorce. *H* and *W*, his wife, are domiciled in New York. They are divorced by a Court of the State of Dakota, where they are not domiciled. The divorce, however, it is proved would be recognised as valid by the Courts of New York. English tribunals, though maintaining that divorce jurisdiction depends, at any rate as regards its extra-territorial effect, upon domicile, treat the Dakota divorce as valid, *i.e.*, the English Divorce Court in this instance considers that the validity of divorce depends upon the "law of New York," where the parties are domiciled, in the widest sense of that term, and acts as it would if it were a Court sitting at New York.<sup>2</sup> The principles further laid down in this Note apply to cases which must be determined by reference to some other law than the *lex domicilii*, *e.g.*, by reference to the *lex situs*. A British subject probably, but not certainly, domiciled in England, was possessed of land in Egypt. He died leaving a will valid in form according to the law both of England and of Egypt. His Egyptian land was sold by his executors. The proceeds (16,000*l.*) were lodged in a bank in England. The dispositions of the deceased's will were valid according to the law of England, but invalid according to the local or territorial law of Egypt. It was admitted on all hands that the right of succession to the 16,000*l.* depended on the right to succession to the Egyptian land. But succession to land is under the Egyptian Code Civil, Arts. 77, 78, "governed by the law of the nation to which the deceased belongs."<sup>3</sup> The meaning of the article was disputed. The evidence of experts was taken: it was by this means proved that the Egyptian Courts would hold that in the circumstances of the case succession to the deceased must, under the articles of the Egyptian Code, be governed by the ordinary territorial law of England. The will was held valid.<sup>4</sup>

<sup>1</sup> The difficulty of these problems is increased by the occasional failure of foreign jurists and tribunals to perceive that nationality or allegiance cannot be made the criterion of the personal law to which a man is subject who is a member of a State, such as the British Empire, which consists of many countries, *e.g.*, England, Scotland, and Canada, each of which possesses a different system of law. As to succession there exists no national law applicable to every British subject.

<sup>2</sup> Compare Rule 87, p. 384, and Exception, p. 386, *ante*.

<sup>3</sup> "Les successions sont réglées d'après les lois de la nation à laquelle appartient le défunt." (Art. 77.)

<sup>4</sup> *In re Baines* (unreported), decided 19th March, 1903, by Farwell, J.

## NOTE 2.

## LAW GOVERNING ACTS DONE IN UNCIVILISED COUNTRIES.

The Rules in this Digest apply only to rights acquired under the law of a civilised country. What, however, is the law, if any, which in the opinion of English Courts governs transactions taking place in an uncivilised country, *e.g.*, in the Soudan, or in some part of the world not under the sovereignty of any ruler recognised by European law?

The question is one which may at times come before an English Court; it is also one to which, in the absence of decisions, nothing like a final answer can be given; all that can be done is to note a few points, as to the matter before us, on which it is possible to conjecture, at any rate, what would be the view taken by English Courts.

We may assume that the legal effect of a transaction taking place, *e.g.*, a contract made, in an uncivilised country could not come before an English Court unless one of the parties at least were the subject of some civilised state.

(1) *As to domicil*.—An Englishman—and probably the citizen of any civilised country—does not, it would seem, by fixing his permanent residence, or settling in an uncivilised country, acquire, for legal purposes, a domicil in such country. A domiciled Englishman who settles in China, and *à fortiori* who settles in a strictly barbarous country, retains his English domicil. *A*, an Englishman, was settled at Shanghai. “In these circumstances it was admitted by the petitioner’s counsel [in a case as to liability to legacy duty] that they could not contend that the testator’s domicil was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in *The Indian Chief* [1801, 3 Rob. Ad. Cas. 29], and by Dr. Lushington in *Maltass v. Maltass*” [1844, 1 Rob. Ecc. Cas. 67, 80, 81].<sup>2</sup>

<sup>1</sup> Compare *Brinkley v. Attorney-General* (1890), 15 P. D. 76; *Bethell v. Hildyard* (1888), 38 Ch. D. 220; *In re Tootal’s Trusts* (1883), 23 Ch. D. 532; *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358; [1893] A. C. 602.

<sup>2</sup> *In re Tootal’s Trusts* (1883), 23 Ch. D. 532, 534, judgment of Chitty, J. Semble, however, that the cases do not show that an Englishman might not for legal purposes acquire a domicil in such a country as China. All they actually establish is the strength of the presumption against his intending to acquire a domicil in China, or rather to subject himself to Chinese law. See *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431.

The principle laid down or suggested in these words by Mr. Justice Chitty—namely, that settlement in an uncivilised country does not change the domicile of the citizen of a civilised country, or at any rate of a domiciled Englishman—goes (if it can be maintained) some way towards solving one or two difficult questions, *e.g.*, What is the law governing the validity of a will made in an uncivilised country by an Englishman domiciled in England?

(2) *As to marriage*.—A marriage made in a strictly barbarous country between British subjects, or between a British subject and a citizen of a civilised country, *e.g.*, an Italian, and it would seem even between a British subject and a native of such uncivilised country, will, it is submitted, be held valid as regards form, if made in accordance with the requirements of the English common law; and it is extremely probable that, with regard to such a marriage, the common law might now be interpreted as allowing the celebration of a marriage *per verba de presenti* without the presence of a minister in orders.<sup>1</sup> A local form,<sup>2</sup> also, if such there be, would seem to be sufficient, at any rate where one of the parties is a native. It is, however, essential that the intention of the parties should be an intention to contract a “marriage” in the sense in which that term is known in Christian countries, *i.e.*, the union of one man to one woman for life to the exclusion of all others.<sup>3</sup> Capacity to marry would apparently depend upon the law of the domicile of the parties, or perhaps more strictly of the husband.<sup>4</sup>

(3) *As to contract*.—Capacity<sup>5</sup> to contract must, it would seem, depend upon the law of the domicile of the parties to the agreement. If either of the parties were under an incapacity by the law of his domicile to enter into a contract, an agreement made by him in an uncivilised country would probably not be enforceable against him in England. This we may be pretty certain would be the case were the party under an incapacity an English infant domiciled in England.

The formalities of a contract probably, and its effect almost certainly, would, under the circumstances supposed, be governed by the proper law of the contract, *i.e.*, by the law contemplated by the parties. Suppose X and A enter into a contract in the Soudan. If the contract is to be performed in England, the incidents would be governed by English law; whilst, if it is to be performed in Germany, its incidents would be governed by German law.<sup>6</sup>

<sup>1</sup> Compare *Reg. v. Millis* (1844), 10 Cl. & F. 534, and *Culling v. Culling*, [1896] P. 116, with *Catterall v. Catterall* (1817), 1 Rob. Ecc. 580, and Wharton (2nd ed.), s. 172, note 2.

<sup>2</sup> See Rule 172, p. 613, and Rule 150, p. 540, *ante*.

<sup>3</sup> *Brinkley v. Attorney-General* (1890), 15 P. D. 76, contrasted with *Bethell v. Hayyard* (1888), 38 Ch. D. 220.

<sup>4</sup> See *Santomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; (1879), 5 P. D. 94.

<sup>5</sup> See Rule 149, p. 534, *ante*.

<sup>6</sup> See Rules 151, 152, pp. 545, 556, *ante*.

(4) *As to alienation of movables*.—If the movables are at the time of the alienation situate in the barbarous country, probably English Courts might hold that the alienation must, in order to be valid, be one which, if made in England, would be valid according to the English common law. There is little doubt that if, though the alienation takes place in an uncivilised country, the movables alienated are situate in a civilised country, the validity of the alienation would depend on the law of that country (*lex situs*).<sup>1</sup>

(5) *Torts*.—When an act which damages *A* or his property is done by *X* in a barbarous country, the character of the act cannot depend on the law of the country where it is done. If both *X* and *A* are domiciled in England, the act is probably wrongful and actionable in England, if it would have been tortious if done in England. If the two parties are domiciled, the one in England and the other, *e.g.*, in Germany, then the act is probably actionable in England, if it be one which is wrongful both according to the law of England and according to the law of Germany. But we can here be guided by nothing but analogy, and all we can do is to consider how far the rules which govern the possibility of bringing an action in England for a tort committed in a foreign and civilised country<sup>2</sup> can by analogy be made applicable to an action for a tort committed in an uncivilised country. An action cannot be maintained in England for a trespass to land in an uncivilised country.<sup>3</sup>

(6) *Procedure*.—An action in England in respect of any transaction taking place in an uncivilised country is clearly, as regards all matters of procedure, governed by English law.<sup>4</sup>

On most of the points, however, considered in this Note, and many others which might suggest themselves, we must trust wholly to conjecture, and must admit that what is the law, if any, governing transactions taking place in an uncivilised country, is in many instances a matter of absolute uncertainty. If, for example, *X*, an Englishman domiciled in England, whilst in an uncivilised country promises *A*, a Scotchman domiciled in Scotland, out of gratitude for some past service, to pay *A* 10*l.* on their return home, is the promise governed by English law, and therefore invalid for want of a consideration, or by Scotch law, under which, apparently, it may be valid? How, again, if the position of the parties had been reversed, and the promise had been made by *A*, the Scotchman domiciled in Scotland, to *X*, the Englishman domiciled in England? To these and similar inquiries no certain reply is, it is conceived, possible.

<sup>1</sup> See Rules 143, 144, pp. 519, 522, *ante*.

<sup>2</sup> See Rules 177—179, pp. 645—647, *ante*.

<sup>3</sup> *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

<sup>4</sup> See Rule 193, p. 708, *ante*.



## NOTE 3.

CASE OF *KAUFMAN* v. *GERSON*.<sup>1</sup>

*A*, who is a Frenchman domiciled in France, brings an action in the High Court against *W*, a Frenchwoman, married to *H*, a Frenchman, also domiciled in France, for 100*l.* due from *W* to *A* under a contract to pay *A* a sum of 900*l.* The contract is entered into in France; has no reference to the law of England, and is, from the nature of things, performable in France. The consideration for the contract is, that *A* agrees with *W* not to prosecute *H* for a criminal offence actually committed by *H*. The contract is, by French law, legal. *A* has abstained from prosecuting *H*, and *W* has, under the contract, paid him 800*l.* She, now being in England, refuses to pay him the balance of 100*l.* *W* contends that the contract cannot be enforced in England, and counterclaims for the repayment of the 800*l.* Wright, J., gives judgment for *A* on the claim and counterclaim. His judgment is reversed by the Court of Appeal. Mr. Justice Wright's judgment is based on the broad principle that where a contract is not invalid by the law of the country where it is both made and is to be performed, an action is maintainable upon it; *i.e.*, it is to be held valid in England. The judgment of the Court of Appeal is based upon the equally broad principle that an English Court will not enforce a foreign contract, though valid by the law of the country in which it is made, where the Court deems the contract to be in contravention of some essential principle of justice and morality, or to use the language of Westlake, that "where a contract conflicts with what "are deemed in England to be essential public or moral interests, it "cannot be enforced here, notwithstanding that it may have been "valid by its proper law."<sup>2</sup> Each principle is sound. The question for consideration is, whether the principle relied upon by the Court of Appeal was properly applied? On this point it is possible to entertain grave doubt.

1. The view of the Court avowedly was that *W* was induced to enter into the contract with *A* under coercion or duress. But was this really the case? The ordinary cases of coercion are cases in which one person, by *unlawful* physical or moral pressure, compels another to give him money, or to enter into a contract, or where a highwayman compels a traveller, at the point of the pistol, to give up his purse or to sign a cheque for 1,000*l.* in the highwayman's favour. But *A* did a lawful act, whereby he induced *W*, for a lawful con-

<sup>1</sup> See [1904] 1 K. B. (C. A.) 591; 73 L. J. K. B. 320; and 20 L. Q. R. (1904), pp. 227—229.

<sup>2</sup> Westlake, s. 215, p. 283.

sideration, to enter into a lawful contract. This is a different thing from coercion.

2. There was admittedly a contract between *A* and *W*, and a contract lawful according to the law of France. The real objection to the contract on the part of the Court of Appeal was that the consideration, namely, *A*'s agreement to abstain from the prosecution of *H*, involved a violation of natural justice. This is, at least, doubtful. *W* prefers the payment of 900*l.* to the prosecution of her husband, *H*. She obtains, by paying the money, a real and indubitable advantage. She would, in all likelihood, have deeply regretted to find that the law of France made it impossible for her to save her husband's character by agreeing to pay 900*l.* Why, then, is she any more coerced than is any party to a contract who is compelled to pay a large sum because he ardently desires to obtain a particular advantage?

3. The Court of Appeal must have held that the law of France ought not to have sanctioned a bargain such as that made between *A* and *W*. This idea underlies the Court's judgment, but it is at best an idea of dubious truth. French civilisation and morality are as high as our own. The presumption should always be in favour of the justice of a French law; and, after all, there is no patent injustice in allowing a person to escape from criminal prosecution by making compensation to the sufferer whom he has damaged. Admit at once that English Courts are wise in discountenancing such arrangements as that between *A* and *W*. But as between the parties to the arrangement there need have been no unfairness therein.

4. There remains a more technical, but not a frivolous objection to the judgment of the Court of Appeal. In 1860 the Court of Exchequer Chamber (whose decisions are understood to be binding on the Court of Appeal) held that a contract for the sale of slaves, to be performed in Brazil, where slavery was then lawful, was enforceable in England.<sup>1</sup> How is *Kaufman v. Gerson* to be reconciled with this? Are we to believe that compounding an offence is more obviously contrary to universal justice than slave-trading?

#### NOTE 4.

##### DECREASING INFLUENCE OF THE *LEX SITUS*.

From the time when Story published his *Conflict of Laws*<sup>2</sup>—up to, at any rate, 1840, the date of *Birtwhistle v. Vardill*<sup>3</sup>—English Courts held that every question with regard to land or immovable property

<sup>1</sup> *Santos v. Illidge* (1860), 8 C. B. (N. S.) 861; 29 L. J. C. P. 348.

<sup>2</sup> Story, s. 424, and p. 500, *ante*.

<sup>3</sup> (1840), 7 Cl. & F. 895.

wherever situate, and above all when it was situate in England, must be determined in accordance with the *lex situs*, which as regards England meant the local or territorial law of England.

This predominance of the *lex situs* has during the last sixty-eight years been undermined, or limited by the recognition of several limitations thereto.

1. The natural meaning and effect of *Birtwhistle v. Vardill* has been cut down by judicial decisions or expressions of opinion.

*Birtwhistle v. Vardill*, it is now all but certain, will be held to apply only to property which ultimately passes in the case of intestacy to the heir; it does not apply to any interest in land, *e.g.*, leaseholds which can be brought within the class of personal property or estate: it does not apply to freehold property which devolves under a will upon a person who, being born out of wedlock, cannot be the "heir"<sup>1</sup> to English land, but who, being legitimated by the subsequent marriage of his parents, takes English real estate under a devise to children.<sup>2</sup> In other words, the rule laid down in *Birtwhistle v. Vardill* is interpreted as relating only to the case of descent upon an intestacy, and does not affect a devise of real estate to children.<sup>3</sup> It is further probable that the rule in *Birtwhistle v. Vardill* does not apply to the case in which a person claims real estate under a settlement whereby the estate passes to persons designated as children of a predecessor.

2. Under the Wills Act, 1861 (Lord Kingsdown's Act), English leaseholds, or rather any interest in English land which is not freehold, may pass under a will which does not comply with the formalities required by the Wills Act, 1837.<sup>3</sup>

3. A marriage between persons domiciled in a foreign country and made subject to the law of such country, *e.g.*, France, operates, or at any rate may possibly operate, as an assignment of English land.<sup>4</sup> English decisions indeed tend towards, even though they have not as yet positively established, the principle that where a marriage takes place without any marriage contract or settlement, the mutual property rights of husband and wife are subject to an implied or tacit contract that these rights shall be governed by the law of the matrimonial domicile.

4. The Naturalization Act, 1870, makes it possible for an alien to hold "real and personal property of every description" in the United Kingdom.<sup>5</sup>

<sup>1</sup> See Rule 186, pp. 479, 480, and pp. 485—488, *ante*.

<sup>2</sup> *In re Grey's Trusts*, [1892] 3 Ch. 88; and see p. 488, *ante*.

<sup>3</sup> See pp. 673, 677, *ante*.

<sup>4</sup> See pp. 512, 513, *ante*.

<sup>5</sup> Naturalization Act, 1870, s. 2.

## NOTE 5.

PREFERENCE OF ENGLISH COURTS FOR *LEX LOCI CONTRACTUS*.

It is laid down in the foregoing pages that a contract is often governed, not by the law of the place where it is made (*lex loci contractus*), but by the law of the place where it is to be performed (*lex loci solutionis*).<sup>1</sup> The reports, however, and text-books of authority, reiterate the maxim that a contract is governed by the law of the place where it is made.

The apparent contradiction between these statements is little more than verbal, and may be explained by the history of English judicial legislation with regard to the conflict of laws.

English judges, when, about a century and a half ago, they were for the first time called upon to deal frequently with the conflict of laws, no doubt conceived that matters of form, matters of substance, and, in short, everything connected with a contract, except matters of procedure, were governed by the *lex loci contractus*, and these words they interpreted as meaning "the law of the place where the contract was made." The adoption of a formula which they somewhat misinterpreted has influenced to a limited degree the substance of their decisions, especially with regard to the validity of a marriage.<sup>2</sup> It has still more influenced the language in which English judgments have been and are expressed. For English Courts soon found it necessary, when interpreting contracts which contained in them some foreign element, to give effect to other laws besides the law of the place where the contract was made, and especially, as regards the mode of performing a contract, to the law of the place of performance (*lex loci solutionis*). This change of doctrine was, as often happens in the case of judicial legislation, combined with verbal adherence to an old formula not really consistent with the new theory. The expression *lex loci contractus* was retained, but was re-interpreted so as to mean "not the law of the country where a contract was made," but the "law of the country with a view to the law whereof a contract was made."<sup>3</sup> This law may be the law of the country where a contract was made, but may, it is manifest, be the law of some other country, and is very frequently the law of the country where the contract is to be performed. The same result was sometimes attained by another

<sup>1</sup> See Rule 152 and Sub-Rules thereto; pp. 556, 560—563, *ante*.

<sup>2</sup> See Rule 172, p. 613, *ante*.

<sup>3</sup> For the transition from the older to the later and more correct doctrine, see *Rothschild v. Currie* (1841), 1 Q. B. 43, 49; *Allen v. Kemble* (1818), 6 Moore P. C. 314, 322, with which compare Story, ss. 242, 263, 272, 282, 314, 315.

method of reasoning. It was laid down that a person must be assumed to have contracted at the place where his contract was to be performed. By either method of interpretation an actual reference to the law contemplated by the parties, which was more often than not the *lex loci solutionis*, was masked, as it still often is in English decisions and text-books, under a nominal reference to the law of the place of the contract. The substitution of the law of the place of performance (*lex loci solutionis*) for the law of the place where a contract was made (*lex loci celebrationis*) was the easier, because, in the vast majority of instances, persons intend that their contracts shall be performed in the country where they are made. The law, therefore, governing a contract may often, with almost equal propriety, be described as the *lex loci solutionis* or the *lex loci celebrationis*. The adherence, however, to the term *lex loci contractus* has produced two effects. It has, till comparatively recent years, concealed from English lawyers the principle that the interpretation, as contrasted with the formal validity, of a contract is governed not by the law of the place where the contract is made, but by the law (of whatever country) contemplated by the parties, and that this law is constantly the *lex loci solutionis*. It has, further, led English judges to give a preference to the law of the country where a contract is made. Where the law governing the incidents of a contract is doubtful, our Courts fall back upon the law of the place where a contract is made (*lex loci contractus*), whilst foreign jurists, it would seem, tend to fall back on the law of the place where the contract is to be performed (*lex loci solutionis*). Both English judges and foreign Courts or writers, however, in fact, adopt one principle, though they apply it somewhat differently.<sup>1</sup> This is that the interpretation of a contract and the obligations arising under it are, in so far as they depend on the will of the parties, to be determined in accordance with the law contemplated by the parties.

## NOTE 6.

## DEFINITION OF DOMICIL.

## I. DEFINITION PROPOSED IN THIS TREATISE.

A person's home or domicile, in so far as it is not determined by a direct rule of law,<sup>2</sup> is here defined as the place or country either (i) in which he in fact resides with the intention of residence, or (ii) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*), or (iii) with

<sup>1</sup> *Hamlyn v. Talisker Distillery*, [1894] A. C. 202, 212, language of Lord Watson.

<sup>2</sup> Compare Rule 1, p. 82, *ante*, and p. 84, *ante*.

regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there; or (using the word "abandon" in the strict sense given it throughout these pages) as the place or country in which a person resides with the *animus manendi*, or intention of residence, or which, having so resided in it, he has not abandoned.<sup>1</sup>

Any one who bears in mind the explanations of the terms "residence" and "*animus manendi*" given in this treatise will perceive at once that the proposed definition lays no claim to originality, but is simply an attempt to render into somewhat precise terms definitions which have been already in substance suggested by authors of eminence, such as Savigny, Story, and Phillimore. He will also perceive that this definition, in common with most of the received definitions of the term "domicil," leaves out of account the cases in which a domicil is directly created by operation of law. This omission is intentional. To define "domicil" when created by operation of law would be simply to enumerate the cases in which rules of law create what may be termed conventional domicils. These rules cannot easily be reduced to a simple formula, and the attempt to enumerate them under a general definition of "domicil" would needlessly embarrass the admittedly difficult attempt to explain the meaning of "domicil" as created by or dependent upon a person's own act. It is well, however, to bear in mind that definitions of "domicil" do not in general include cases of domicil created by operation of law, and that with such cases this Note has no concern.

## II. OTHER DEFINITIONS COMPARED.

(A) *Definition of Roman Law*.—"In eodem loco singulos habere "domicilium non ambigitur, ubi quis larem, rerumque ac fortunarum "suarum summam constituit, unde rursus non sit discessurus, si nihil "avocet, unde cum profectus est peregrinari videtur, quo si rediit peregrinari jam destitit."<sup>2</sup>

This celebrated definition is, as has been remarked,<sup>3</sup> not so much a logical definition as a rhetorical description of a home. The "place" to which it applies is rather a house than a country, and its terms cannot be so twisted as to suit the domicil known to English lawyers. It includes, however, the essential constituents of a home, viz., residence and the *animus manendi*, and has the further merit of covering the cases in which domicil is retained without actual residence.

(B) *Vattel's Definition*.—"Domicil is "an habitation fixed in some "place with an intention of remaining there always."<sup>4</sup>

<sup>1</sup> See pp. 84—86, *ante*.

<sup>2</sup> Cod., lib. X., tit. xxxix. 7.

<sup>3</sup> See *Lová v. Colvin* (1859), 28 L. J. Ch. 361, 365, judgment of Kindersley, V.-C.

<sup>4</sup> Vattel, *Droit des Gens*, liv. i., c. xix., s. 218, Du Domicile.

As remarked by Story, this definition is improved by substituting for the latter part of it the expression "without any present intention of removing therefrom;"<sup>1</sup> but even with this amendment it hardly covers the case where a domicile once acquired is retained, either by actual residence after the *animus manendi* has ceased to exist, or by the intention to reside after actual residence has come to an end.

(C) *Denizart's Definition*.—The domicile of the person is "the place where a person enjoys his rights, and establishes his abode, and makes the seat of his property."<sup>2</sup>

(D) *Pothier's Definition*.—"The place where a person has established the principal seat of his residence and of his business."<sup>3</sup>

(E) *Definition of French Code*.—"Le domicile de tout Français, quant à l'exercice de ses droits civils, est au lieu où il a son principal établissement."<sup>4</sup>

(F) *Definition of Italian Code*.—"Il domicilio civile di una persona è nel luogo in cui essa ha la sede principale dei propri affari ed interessi.

"La residenza è nel luogo in cui la persona ha la dimora abituale."<sup>5</sup>

These definitions rather lay down a rule of evidence for determining what is the place where a person is to be considered to have his domicile than define the meaning of the term. They belong to a system of law which determines a person's legal home by the existence of some one fact, such as his carrying on business in a particular place. There is much to recommend this mode of fixing a person's legal home, but it is not adopted by our Courts. The Italian definition coincides, it may be noticed, with the definition propounded in this treatise, in so far as it bases the description of "domicil" upon the definition of residence, and, further, defines residence itself in terms not very unlike those employed in this treatise.<sup>6</sup>

(G) *Savigny's Definition*.—"That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]."<sup>7</sup>

This definition brings into prominence exactly the point neglected by most writers, viz., the element of choice or intention. The words enclosed in brackets appear superfluous, since they point to a consequence of the place being a permanent abode.

The definition agrees in substance with that proposed in this work, but is too general in its terms to be of service to English lawyers, and

<sup>1</sup> See Story, s. 43.

<sup>2</sup> Encyclop. Moderne, Art. Domicil.

<sup>3</sup> Pothier, Introd. Gén. Cout. d'Orléans, ch. 1, s. 1, Art. 8.

<sup>4</sup> Code Civil, Art. 102.

<sup>5</sup> Codice Civile del Regno d' Italia, Tit. II. 16.

<sup>6</sup> See p. 83, ante.

<sup>7</sup> Savigny, s. 353, Guthrie's transl. (2nd ed.), p. 97.

though, if rightly understood, correct, might, at any rate as translated into English, mislead. For the expression "freely chosen," which probably only means that the residence might be a consequence of choice, whatever the motives for that choice, might give rise to the perplexities which have flowed from the use of the word "voluntary;"<sup>1</sup> and the terms of the definition might be taken to imply (what is certainly not Savigny's intention) that an Englishman, who had made up his mind to emigrate to America and settle there, acquired an American domicile by his "free choice of America as a permanent abode" before he leaves England.

(H) *Story's Definition*.—"That place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom."<sup>2</sup>

This definition deserves particular attention, both from the celebrity of the author and from the influence it has had on English decisions. It may be considered to approach more nearly than any other to an approved or authorized description of "domicil."<sup>3</sup> It has the merit of pointing to the negative nature of the intention or purpose on which domicile depends. Taken with the explanations with which it is accompanied in Story's work, it forms by no means a bad description of "domicil," but Story himself probably did not intend to attempt (what he very rarely aims at) a precise definition. Looked at in that light, his language would not, it is submitted, be accurate. His words hardly include the case of an Englishman resident for years abroad, yet still retaining his English domicile. It could certainly not in ordinary language be said to be a habitation from which he had no intention of removing.

(I) *Phillimore's Definition*.—"A residence at a particular place, accompanied with [positive or presumptive proof of] an intention to remain there for an unlimited time."<sup>4</sup>

This definition is, except for the words printed in brackets, in substance the same as Story's. These words, however, might be with advantage omitted. They are at best superfluous, for the maxim *de non apparentibus et non existentibus eadem est ratio* is in law of universal application, and a fact which cannot be proved to exist has, for legal purposes, no existence. They, moreover, tend to confuse together the inquiry, What is the nature of the fact constituting domicile, or, in other words, its definition? with the different question, What is the evidence by which the existence of this fact, when its nature is known, can be proved? It is, however, easy to conjecture

<sup>1</sup> See pp. 111-113, 149-153, *ante*.

<sup>2</sup> Story, s. 43.

<sup>3</sup> See, *e.g.*, *Attorney-General v. Kent* (1862), 1 H. & C. 12, 21; 31 L. J. Ex. 391, 396, judgment of Martin, B.

<sup>4</sup> Phillimore, s. 49.



what it is which has induced so distinguished a writer as Sir Robert Phillimore to introduce into his definition of "domicil" terms which are, to say the least, superfluous. They are apparently intended to cover the cases in which a person's domicil is determined by a fixed rule of law independently of his own act. The author of the definition probably considers that in such instances the rule of law may be best represented as a rule of evidence affording positive or presumptive proof that a person to whom a domicil is assigned in a particular country by operation of law is there domiciled.

(J) *Vice-Chancellor Kindersley's Definition*.—"That place is properly "the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home."<sup>1</sup>

This definition lacks precision, and does not accurately point out the conditions under which a domicil may be retained; still it has the great merit of fixing attention on the nature of the purpose or state of mind on which the acquisition or maintenance of a domicil depends.

The definitions of Savigny, Story, Phillimore, and Vice-Chancellor Kindersley, though framed with different degrees of precision, each define domicil by analysing it into its essential characteristics, viz., residence, combined or connected with the intention of permanent residence or the *animus manendi*. They are each, it is submitted, consistent with each other and with the definition propounded in this treatise.

### III. CRITICISMS ON ATTEMPTS TO DEFINE DOMICIL.

English judges have certainly not underrated the difficulty of defining the term "domicil." Their language, on the contrary, generally points to the two conclusions,—first, that a satisfactory definition of domicil is from the nature of things unattainable; and, secondly, that, even if the term be definable, every attempt to obtain a serviceable definition has hitherto ended in failure.

Each of these opinions, with the grounds on which it is supported, deserves careful consideration.

The opinion that the word "domicil" does not admit of definition has been expressed by eminent judges in the following terms:—

"Domicil," it has been said, means "permanent home, and, if that "was not understood by itself, no illustration would help to make it

<sup>1</sup> *Lord v. Colvin* (1859), 28 L. J. Ch. 361, 366, per Kindersley, V.-C. See, for an unfavourable criticism on this definition, *Moorhouse v. Lord* (1863), 10 H. L. C. 272; 32 L. J. Ch. 295, 298, 299, judgment of Lord Chelmsford.

"intelligible."<sup>1</sup> "Any apparent definition, such as a man's 'settled' 'habitation,' or the like, would," it has been urged, "always terminate in the ambiguity of the word 'settled,' or its equivalent, depending for their interpretation on the intention of the party, which must be collected from various *indicia*."<sup>2</sup> "With respect to these questions of domicile, there is no precise definition of that word, or any formula laid down by the application of which to the facts of the case it is possible at once to say where the domicile may be."<sup>3</sup> "I find it," says another very eminent judge, "stated in Dr. Phillimore's book that Lord Alvanley commends the wisdom of a great jurist of the name of Bynkershoek in not giving a definition of [domicil], and certainly it is extremely difficult for any one to give a simple definition to that word."<sup>4</sup>

The opinion which these dicta embody is, however, in spite of the eminence of its supporters, one in which it is on logical grounds hard to acquiesce. To define a word is simply to explain its meaning, or, where the term is a complex one, to resolve it into the notions of which it consists. The only insuperable obstacles to definition would seem on logical grounds to be, either that a term is of so complex a nature that language does not avail to unfold its meaning (or, in other words, that the term is in the strict sense incomprehensible), or that it connotes an idea so simple as not to admit of further analysis. Neither of these obstacles can, it is conceived, hinder the definition of the term "domicil." It is certainly not the name of any notion so complex that it cannot be rendered into language. It is certainly, again, not the name for an idea so simple as not to admit of further analysis. The expression, for example, "permanent home," which is often used as its popular equivalent, is clearly a complex one, which needs and may receive further explanation.

Nor are the reasons suggested for holding that domicile is indefinable by any means conclusive. The objection often made in various forms, that any definition must terminate in the ambiguity of the word "settled" or its equivalent, may be a proof that the process of definition has to be pushed farther than it has hitherto been carried, but does not show either that definitions already made are, as far as they go, inaccurate, or still less that the attainment of a complete definition is impossible. The perfectly sound remark, again, that no formula can be laid down by the application of which to the facts of the case it is possible at once to say where a person's domicile may be points, not to any necessary defect in the definition of the term, but to

<sup>1</sup> *Whicker v. Hume* (1858), 28 L. J. Ch. 396, 400, per Lord Cranworth. Compare *Moorhouse v. Lord* (1863), 32 L. J. Ch. 295, 298, language of Lord Chelmsford, and *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 449.

<sup>2</sup> *Forbes v. Forbes* (1854), 23 L. J. Ch. 724, 726, per Wood, V.-C.

<sup>3</sup> *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 731, per Kindersley, V.-C.

<sup>4</sup> *Attorney-General v. Rowe* (1862), 31 L. J. Ex. 314, 319, per Bramwell, B.

the narrow limits within which definition, however perfect, can be of practical utility. Any term the meaning of which involves a reference to "habit" or to "intention" will always be difficult of application. No definition can ever remove the difficulty of determining in a particular case what number of acts make a course of action habitual, or what is the evidence from which we may legitimately infer the existence of intention. Difficulties similar in kind, if not in degree, to those which attend the application of any definition of domicile to the facts of the case arise whenever questions as to "possession" or as to "intention" require to be answered by the Courts. The peculiar difficulty of dealing with the term "domicil" arises, it is apprehended, from its being a term the meaning of which involves a reference both to habit and to intention; while the intention, viz., the *animus manendi*, is one of a very indefinite character, and as to the existence of which the Courts often have to decide without possessing the data for a reasonable decision.

The admission, in fact, that domicile depends on a relation between "residence" and "the intention of residence," or, to use the words of Lord Westbury, that "domicil of choice is a conclusion or inference " which the law derives from the fact of a man fixing voluntarily his "sole or chief residence in a particular place, with an intention of "continuing to reside there for an unlimited time,"<sup>1</sup> is, it is conceived, a virtual concession that a definition of domicile is, at any rate, possible. When his lordship adds that "this is a description of the "circumstances which create or constitute a domicile, and not a definition of the term," there is a difficulty in following his reasoning, for such a description, if accurate, is an explanation, or, in other words, a definition, of what is meant by domicile. It is, at any rate, the only kind of definition which a lawyer need care to frame.

The prevalent opinion that no attempt to define domicile has been crowned with success deserves careful consideration. For, if the opinion be well founded, the conclusion naturally suggests itself that, where writers of great eminence have failed, success is practically unattainable, whilst the mere existence of the opinion in question appears, at first sight, to be something like a guarantee that it rests on sound foundations. Hence it is worth while to consider what are the grounds on which the belief that the existing definitions of domicile are unsatisfactory is based, and whether it be possible to find an explanation for the existence of this belief, which, without impugning the sagacity of those by whom it has been entertained, leaves its truth at least open to doubt.

English tribunals have tested every definition of domicile by what

<sup>1</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458. And compare *Bell v. Kennedy* (1868), *ibid.*, 307, 319; *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 731, 732; *Lyall v. Paton* (1856), *ibid.*, 746, 739.

undoubtedly is, subject to one condition, the true criterion, at any rate in an English Court, of the soundness of such a definition, viz., whether it includes all the cases in which it has been judicially decided that a person has, and excludes all the cases in which it has been judicially decided that a person has not, a domicile in a particular country; and it is because judges have found that no received definition has stood this test, that they have pronounced every existing definition defective, and have all but despaired of the possibility of framing a sound definition. The condition, however, of the validity of this criterion is, that the cases by which a definition is tested should be really inconsistent with the definition, and that the cases themselves should be decided consistently with generally admitted principles. For if a definition is really applicable to cases which at first sight seem inconsistent with it, or if the decisions by which it is tested are themselves in principle open to doubt, the difficulty which arises in applying the definition is in reality a strong testimony to its essential soundness. The matter, then, for consideration is whether the test applied to the definitions of domicile has fulfilled the condition on which its validity depends.

Definitions of domicile have made shipwreck on three distinct sets of cases, which may, for the sake of brevity, be described as "Anglo-Indian Cases," "Allegiance Cases," and "Health Cases."

(A) *Anglo-Indian Cases*.<sup>1</sup>—A series of decisions beginning, in 1790, with *Bruce v. Bruce*,<sup>2</sup> and ending, in 1865, with *Jopp v. Wood*,<sup>3</sup> decided that an officer in the service of the Company was domiciled in India. It was as clear, in ninety-nine instances out of a hundred, as such a thing could be, that a servant of the Company did not intend to make India his permanent home.<sup>4</sup> It was, therefore, in the strictest sense impossible that any definition which made the existence of domicile depend on the *animus manendi* should justify the decisions as to Anglo-Indian domicile. No accuracy of terms or analysis of the meaning of the word could by any possibility achieve this result. As long, therefore, as the Anglo-Indian cases were held to be correctly decided, English judges were inevitably driven to the conclusion that every received definition of domicile, such, for example, as Story's, was incorrect. The Courts, however, have now pronounced the Anglo-Indian cases anomalous, or, in other words, have held that these cases were in principle wrongly decided, though their effect could now be got rid of only by legislative action.<sup>5</sup> The Anglo-Indian

<sup>1</sup> See pp. 156—158, *ante*.

<sup>2</sup> 2 B. & P. 229.

<sup>3</sup> 4 De G. J. & S. 616; 34 L. J. Ch. 212. See also *In re Tootal's Trusts* (1883), 23 Ch. D. 532.

<sup>4</sup> *Allardice v. Onslow* (1864), 33 L. J. Ch. 434, 436, judgment of Kindersley, V.-C.

<sup>5</sup> *Jopp v. Wood* (1865), 34 L. J. Ch. 212; 4 De G. J. & S. 616; *Drevon v. Drevon* (1864), 34 L. J. Ch. 129, 134.

cases, therefore, do not fulfil the condition necessary to make them a test of a definition of domicile.<sup>1</sup>

(B) *Allegiance Cases*.<sup>2</sup>—The doctrine was at one time laid down<sup>3</sup> that a change of domicile involves something like a change of allegiance, and that, for instance, an Englishman, in order to acquire a French domicile, must at any rate, as far as in him lies, endeavour to become a French citizen. This doctrine was strictly inconsistent with the theory, on which the received definitions of domicile are based, that a domicile is merely a permanent home. As long, therefore, as this doctrine was maintained, it was impossible for English judges to treat as satisfactory any of the current definitions of domicile. The attempt, however, to identify change of domicile with change of allegiance has now been pronounced on the highest authority a failure.<sup>4</sup> The allegiance cases, therefore, are not entitled to weight, and are no criterion of the correctness of a definition of domicile.

(C) *Health Cases*.<sup>5</sup>—Dicta, though not decisions, may be cited as showing that a change of residence made by an invalid for the sake of his health cannot effect a change of domicile. This doctrine, if adopted without considerable limitations, makes domicile depend upon the motive, and not upon the intention, with which a person changes his residence. It is, therefore, inconsistent with, and throws doubt upon, the correctness of any definition of domicile depending upon the combination of residence and *animus manendi*. The doctrine, however, is now shown by the one decided case on this subject<sup>6</sup> to be either unfounded, or else to be explainable in a manner perfectly consistent with the ordinary definitions of domicile.

A result, therefore, of the examination of the three sets of cases by which definitions of domicile have been tested and found wanting is, that no one of these sets fulfils the conditions necessary to make it the criterion of a definition, and that the difficulty which has been found in reconciling several definitions with the Anglo-Indian cases, the allegiance cases, and the health cases, tells rather in favour of than against the correctness of the definitions, which, because they could not cover these cases, were naturally thought incorrect and unsatisfactory.

A survey, in short, of the attempts which have been made to define domicile, and of the criticisms upon such attempts, leads to results which may be summed up as follows:—

*First.* Domicile, being a complex term, must from the nature of

<sup>1</sup> Compare *In re Tootal's Trusts* (1883), 23 Ch. D. 532, and *Abd-ul-Messih v. Farru* (1888), 13 App. Cas. 431, as also Westlake (4th ed.), pp. 338, 339, s. 265.

<sup>2</sup> See pp. 114, 115, *ante*.

<sup>3</sup> *Moorhouse v. Lord* (1863), 10 H. L. C. 272; 32 L. J. Ch. 295; *Whicker v. Hume* (1858), 7 H. L. C. 124; 28 L. J. Ch. 396.

<sup>4</sup> *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 452, judgment of Hatherley, Ch.; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617.

<sup>5</sup> See pp. 149–153, *ante*.

<sup>6</sup> *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13.

things be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analysing it into its elements.

*Secondly.* All the best definitions agree in making the elements of domicile "residence" and "*animus manendi*."

*Thirdly.* Several of these definitions—such, for example, as Story's, Phillimore's, or Vice-Chancellor Kindersley's—have succeeded in giving an explanation of the meaning of domicile, which, even if not expressed in the most precise language, is substantially accurate.

*Fourthly.* The reason why English Courts have been inclined to hold that no definition of domicile is satisfactory is, that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta. When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicile now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicile. The great difficulty, in short, which English judges have experienced in discovering a satisfactory definition arises from the fact that, when of recent years the Courts have been called upon to determine questions of domicile, they have been hampered by the almost insuperable difficulty of reconciling a generally sound theory with decisions or dicta delivered at a period when the whole subject of the conflict of laws was much less perfectly understood than at present.

## NOTE 7.

### COMMERCIAL DOMICIL IN TIME OF WAR.<sup>1</sup>

#### I. PERSON'S CHARACTER DETERMINED BY DOMICIL.

In time of war the answer to the question whether a person is or is not to be considered an alien enemy is, in most cases at any rate, to be determined by reference, not to his nationality or allegiance, but to his trading residence or commercial domicile. Every person domiciled in a state engaged in hostilities with our own, whether he is a born subject of that state or not, is to be regarded as an alien enemy;<sup>2</sup> and, speaking generally, a person domiciled in a neutral country is to be regarded as for commercial purposes a neutral, even though he be in fact a British subject, or a subject of a state at war with England.<sup>3</sup> "The position is a clear one, that if a person goes into a

<sup>1</sup> Duer, *Insurance*, pp. 494—524; 1 Kent (12th ed.), pp. 73—81; 1 Arnould, *Marine Insurance* (3rd. ed.), pp. 121—134. Compare 1 Arnould (7th ed.), ss. 90—100.

<sup>2</sup> 1 Arnould (3rd ed.), p. 121; (7th ed.) s. 90; *The Indian Chief* (1801), 3 C. Rob. 12, 22.

<sup>3</sup> *The Danous* (1802), 4 C. Rob. 255 (n); 1 Duer, pp. 494, 495, 520.

"foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character during his residence and occupation in an enemy's country."<sup>1</sup> A person's character, in short, as a friend or enemy, is in time of war to be determined by what is termed his commercial domicile. Persons who are commercially domiciled in a neutral country are, as far as belligerents are concerned, neutrals; whilst, on the other hand, persons commercially domiciled in a hostile country are, whatever their nationality or allegiance, to be considered enemies, for "persons resident in a country carrying on trade, by which both they and the country were benefited, were to be considered as the subjects of that country, and were considered so by the law of nations, at least so far as by that law to subject their property to capture by a country at war with that in which they lived."<sup>2</sup> Thus, if there be a war between England and France, a British subject residing and trading in France is an alien enemy; whilst a British subject or a French citizen who resides and carries on business in Portugal is, even though he may trade with France, a neutral.

## II. NATURE OF COMMERCIAL DOMICIL.

The nature of the trading residence or commercial domicile, which determines a person's friendly or hostile character in time of war, may be made clear by comparing such commercial domicile with the domicile properly so called, which is referred to in the body of this treatise, and is, in this Note, termed for the sake of distinction a civil domicile. Each domicile is a kind of residence, each bears a close resemblance to the other, but they are distinguished by marked differences.

(A) *Resemblance of commercial domicile to civil domicile.*—A trading or commercial domicile bears so close a resemblance to a civil domicile that it is often described in language which appears to identify the two kinds of domicile. Thus Arnould writes of the domicile which determines a person's character in time of war: "That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, in which, when present, he has the intention of remaining (*animus manendi*) and from which he is never absent without the intention of returning (*animus revertendi*) directly he shall have accomplished the purpose for which he left it"<sup>3</sup>; whilst Duer states with regard to the national character of a merchant: "It is determined solely by the place of his permanent

<sup>1</sup> 1 Kent (12th ed.), p. 75.

<sup>2</sup> *Tabbs v. Bendelack* (1802), 4 Esp. 106, 108, per Lord Kenyon.

<sup>3</sup> 1 Arnould, *Marine Insurance* (7th ed.), s. 90, p. 113.

“residence. In the language of the law, it is fixed by his domicil. “He is a political member of the country into which by his residence “and business he is incorporated—a subject of the government that “protects him in his pursuits—that his industry contributes to support, “and of whose national resources his own means are a constituent “part.”<sup>1</sup> Nor are the points in which the two kinds of domicil resemble each other hard to discern. They are each kinds or modes of residence. The constituent elements of each are, first, “residence”; secondly, a “purpose or intention” (on the part of the person whose domicil is in question) “with regard to residence.” In spite, however, of the terms used by high authorities, and of the undoubted likeness between the two kinds of domicil, they are different in essential particulars.

(B) *Differences between civil and commercial domicil.*—The fundamental distinction between a civil domicil and a commercial domicil is this: A civil domicil is such a permanent residence in a country as makes that country a person’s home,<sup>2</sup> and renders it, therefore, reasonable that his civil rights should in many instances<sup>3</sup> be determined by the laws thereof. A commercial domicil, on the other hand, is such a residence in a country for the purpose of trading there as makes a person’s trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person’s civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home.<sup>2</sup> When a person’s commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there. From this fundamental distinction arise the following differences:—

(1) *As to residence.*—Residence in a country is in general *prima facie* evidence of a person having there his civil domicil, but it is only *prima facie* evidence, the effect of which may be quite got rid of by proof that a person has never lived in the country with the intention of making it his permanent home. But residence is far more than *prima facie* evidence of a person’s commercial domicil. In time of war a man is taken to be domiciled for commercial purposes in the country where he in fact resides, and, if he is to escape the effect of such presumption, he must prove affirmatively that he has the intention of not continuing to reside in such country. A long period further of residence, which, as regards civil rights, is merely evidence of domicil,

<sup>1</sup> 1 Duer, p. 495.

<sup>2</sup> See p. 84, *ante*.

<sup>3</sup> See pp. 84, 108—115, *ante*.



might, it would seem, be absolutely conclusive in determining national character in time of war.<sup>1</sup>

(2) *As to intention*.—The intention, or *animus*, which, in combination with residence, constitutes a civil domicile, is different from the intention or *animus* which, together with residence, makes up a commercial domicile.

The intention which goes to make up the existence of a civil domicile is the present intention of residing permanently, or for an indefinite period, in a given country. The intention which goes to make up the existence of a commercial domicile is the intention to continue residing and trading in a given country for the present. The former is an intention to be settled in a country and make it one's home, the latter is an intention to continue residing and trading there. Hence, on the one hand, a person does not acquire a civil domicile by residence in a country for a definite purpose or period, and cannot by residence in one country, *e.g.*, France, get rid of a domicile in another, *e.g.*, England, if he retains the purpose of ultimately returning to England, as his home; while, on the other hand, the intention "which the law attributes to a person residing in a hostile country, is not disproved by evidence that he contemplated a return to his own country at some future period. If the period of his return is wholly uncertain—if it remains in doubt at what time, if at all, he will be able to accomplish the design,—the design, however seriously entertained, will not avail to refute the legal presumption. A residence for an indefinite period is, in the judgment of law, not transitory, but permanent. Even when the party has a fixed intention to return to his own country at a certain period, yet if a long interval of time—an interval not of months, but of years—is to elapse before his plan of removal can be effected, no regard will be had to an intention of which the execution is so long deferred."<sup>2</sup>

*D*, domiciled in England, goes to British India with the full intention of residing there till he has made his fortune in trade, and of then returning to England, where he has his domicile of origin. He resides in India for twenty years. He retains his English civil domicile. Suppose, however, that *D*, under exactly similar circumstances in every other respect, takes up his residence not in British India, but in the Portuguese settlement in India, and after war has broken out between England and Portugal, continues to reside and trade in the Portuguese settlement, though still retaining his intention of ultimately returning to England. *D* thereupon acquires a Portuguese commercial domicile.

(3) *As to abandonment*.—The rules as to abandonment are different.

<sup>1</sup> 1 Duer, pp. 500, 501; *The Harmony* (1800), 2 C. Rob. 322.

<sup>2</sup> 1 Duer, pp. 500, 501.

A civil domicil once acquired can be changed only by complete abandonment in fact of the country where a person is domiciled.<sup>1</sup> The intention to change, even if accompanied by steps for carrying out a change, will not, it would seem, produce a change as long as the person whose domicil is in question continues in fact to reside in the country where he has been domiciled.

A commercial domicil in time of war can, it would seem, be changed, under some circumstances, by the intention to change it, accompanied by steps taken for the purpose of effecting a change. "The native national character, that has been lost, or partially suspended, by a foreign domicil, easily reverts. The circumstances, by which it may be restored, are much fewer and slighter than those that were originally necessary to effect its change. The adventitious character, that a domicil imposes, ceases with the residence from which it arose. It adheres to the party no longer than he consents to bear it. It is true, his mere intention to remove—an intention not manifested by overt acts, but existing secretly in his own breast, . . . is not sufficient to efface the character that his domicil impressed; something more than mere verbal declarations, some solid fact, showing that the party is in the act of withdrawing, is always necessary to be proved; *still, neither his actual return to his own country, nor even his actual departure from the territories of that in which he resided, is indispensable.*"<sup>2</sup>

(4) *As to domicil by operation of law.*—It may fairly be doubted whether the rules as to domicil by operation of law, *e.g.*, in the case of persons who have in fact no home, or of dependent persons, which play so large part in the law of civil domicil, can be without considerable limitations applied to the ascertainment of commercial domicil. *D*, for example, is a French subject, whose domicil of origin is English. He has an acquired domicil in France. Both France and America declare war against England. *D* thereupon leaves France, intending to settle in New York. He resumes during the transit from one country to another his domicil of origin;<sup>3</sup> but it can hardly be supposed that he is not during such transit an alien enemy. *D*, again, is an infant, or a married woman, carrying on a commercial business on his or her own account in France during a war with England. It can hardly be maintained that the fact of the father in the one case, or the husband in the other, having an English domicil and being resident in England will free *D* from the character of an alien enemy.

(5) *As to special rules.*—There are one or two rules as to commercial domicil which can have no application to an ordinary civil domicil.

<sup>1</sup> *In Goods of Raffeneil* (1863), 32 L. J. P. & M. 203. See Rule 8, p. 119, *ante*.

<sup>2</sup> 1 Duer, pp. 514, 515.

<sup>3</sup> Pp. 122–124, *ante*.

Thus, according to American decisions at least, an American citizen (and the same principle would perhaps be applied by English Courts to British subjects) cannot, by emigration from his own country during the existence of hostilities, acquire such a foreign domicile as to protect his trade during the war against the belligerent claims either of his own country or of a hostile power.<sup>1</sup> So, again, a neutral merchant may, at any time, withdraw his property and funds from a hostile country, and such a withdrawal may restore him to his neutral domicile. But whether the subject of a belligerent state can, after the outbreak of hostilities, withdraw from a hostile state so as to escape the imputation of trade with the enemy is doubtful. If the withdrawal can be effected at all, either it must be done within a short period after the outbreak of war, or any delay in effecting it must be shown to have arisen from necessity or from compulsion.<sup>2</sup>

### III. PERSON'S CIVIL NEED NOT COINCIDE WITH HIS COMMERCIAL DOMICIL.

From the distinctions between a civil and a commercial domicile, the conclusion follows that a person may have a civil domicile in one country, and, at the same time, a commercial domicile or residence in another. Thus, suppose that *D*'s domicile of origin is English, and that he goes to France and sets up in trade there without any purpose of making France his permanent home, but with the distinct intention of returning to England within ten years. He clearly retains his English domicile of origin; and the outbreak of a war between France and England does not of itself affect *D*'s civil domicile.

If *D* continues to reside and trade in France after the outbreak of hostilities, though without any change of intention as to the time of his stay in France, he will acquire a French commercial domicile. In other words, he will have a civil domicile in England and a commercial domicile in France.

Nor is this fact really inconsistent with Rule 3,<sup>3</sup> that no person can, at the same time, have more than one domicile. It only illustrates the fact constantly dwelt upon in this treatise, that residence is different from domicile, and that a person while domiciled in one country may, in fact, reside in another.

<sup>1</sup> 1 Duer, p. 521; *The Dos Hermanos* (1817), 2 Wheaton, 76.

<sup>2</sup> *The Diana* (1803), 5 C. Rob. 60; *The Ocean* (1804), *ibid.* 90; *The President* (1804), *ibid.* 277; 1 Duer, p. 519.

<sup>3</sup> See p. 98, *ante*.

## NOTE 8.

LIMITS OF TAXATION IN RESPECT OF DEATH DUTIES  
AND DUTIES OF INCOME TAX.<sup>1</sup>

## INTRODUCTION.

This Note is concerned with the Death Duties and the Duties of Income Tax, or, more shortly, Income Tax.

DEATH DUTIES.—All the death duties are duties imposed<sup>2</sup> upon the devolution of property on, or in consequence of, a person's death. They now consist of three different duties:—

(1) *Legacy Duty*.<sup>3</sup>—This duty is charged on legacies<sup>4</sup> under a will, and shares in the distributable residue<sup>5</sup> of an intestate's personal estate; legacy duty is now<sup>6</sup> in general, though not quite invariably,<sup>6</sup> chargeable only on the deceased's movable property.

(2) *Succession Duty*.—This is a duty charged upon the succession to any property, whether real or personal, whether immovable or movable, to which one person succeeds<sup>7</sup> on the death of another, but which is not charged with legacy duty.<sup>8</sup>

(3) *Estate Duty*.—This is a duty chargeable on the principal value of all property, real or personal, settled or not settled, or, in other words, on all immovable or movable property which passes on the death of any person dying after the 1st August, 1894.<sup>9</sup>

Legacy duty and succession duty both differ from estate duty in one respect. They are duties on the beneficial succession—using the word “succession” in a wide sense—to property by one person on the death of another, and ultimately fall upon the beneficial successor. Estate duty is, as was probate duty, a duty on the collection or dis-

<sup>1</sup> See Hanson, *Death Duties* (5th ed.), pp. 28—30, 53—55, 123, 368, 369, 476—490; Norman, *Digest of Death Duties* (alphabetically arranged), 2nd ed., titles “Domicile,” “Estate Duty,” “Foreign Property and Foreigners,” “Legacy and Legacy Duty,” “Succession Duty”; Westlake (4th ed.), pp. 130—138; Dowell, *Income Tax Laws* (5th ed.), especially pp. 261—267.

<sup>2</sup> As to legacy duty, see 36 Geo. III. c. 52; 45 Geo. III. c. 28; and, in relation to Ireland, 54 Geo. III. c. 92; 56 Geo. III. c. 56; 5 & 6 Vict. c. 82; 43 Vict. c. 14; 44 Vict. c. 12; and Hanson, pp. 45—47.

<sup>3</sup> For definition of “legacy” see 36 Geo. III. c. 52, s. 7; 45 Geo. III. c. 28, s. 4; 8 & 9 Vict. c. 76, s. 4; Norman, *Legacy and Legacy Duty*, p. 282, and following.

<sup>4</sup> See 36 Geo. III. c. 52, s. 2.

<sup>5</sup> Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 19.

<sup>6</sup> For exceptional cases in which legacy duty may still be chargeable on immovable property, see *Chatfield v. Berchtoldt* (1872), L. R. 7 Ch. 192; Hanson, pp. 29, 30; and note that legacy duty is payable in respect of chattels real (immovables) directed to be sold *by will*.

<sup>7</sup> Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1, 2, 10.

<sup>8</sup> *Ibid.*

<sup>9</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2, 24.

tribution of an estate passing on a person's death. It falls on the estate, and does not fall upon a beneficiary as such. Thus if *D*,<sup>1</sup> a deceased person, has left a large estate more than sufficient to pay all claims upon it, and has bequeathed a legacy of 1,000*l.* to *A*, legacy duty falls upon and is ultimately paid by the legatee, *i.e.*, is deducted from the 1,000*l.*; estate duty does not fall upon the legatee, but falls upon the estate, and is ultimately paid by the person or persons to whom, after payment of legacies and the like, the estate comes, *e.g.*, the heir or residuary legatee.

**INCOME TAX.**—This is at once a property tax and a tax on income. As a property tax it may be described as a tax on land or immovable property in respect of the annual value thereof, and is charged<sup>2</sup> under or in accordance with Schedules A and B of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2. As an income tax it may in very general terms be described as a tax on the “annual profits, gains, or interest,” or in popular language, “income,” which a person derives from property, from investments, from a trade or profession, or from any other like source.<sup>3</sup> As a tax on income, it is charged under or in accordance with Schedules C, D, and E of the Income Tax Act, 1853.

Death duties and duties of income tax are all imposed or kept in force by Acts of the Imperial Parliament, and now<sup>4</sup> by Acts which extend to the whole United Kingdom.

With regard to any of these duties two questions may be asked :—

*First. What is the nature of the property in respect of which the duties are imposed?*

This inquiry is one which has no immediate connection with the subject of this treatise, and an answer sufficient for our present purpose has already been given to it in very general terms.<sup>5</sup>

*Secondly. What are the limits within which the Acts imposing death duties and income tax operate, or in other words, what are the limits within which duties are imposed by these Acts on the property of the kind to which they apply?*

This inquiry, though it does not form part of is closely connected with the subject of this treatise. To answer this inquiry, or, in other

<sup>1</sup> “*D*” is used throughout this Note for the deceased person on whose death property devolves.

<sup>2</sup> Duties of income tax are of course imposed under the annual Income Tax Act, though they are charged in accordance with Schedules A to E of the Income Tax Act, 1853. These schedules originally formed part of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), which still in most matters regulates the collection and incidence of the tax.

<sup>3</sup> It does not include an income derived from anything which is in reality a gift, *e.g.*, an allowance made out of good will by a father to a son of full age.

<sup>4</sup> Up to 1853 the Income Tax Acts did not extend to Ireland.

<sup>5</sup> A more minute or complete reply, if needed, must be sought for from the treatises on each kind of duty, such, for example, as Norman, *Digest of Death Duties*; Hanson, *Death Duties*; and Dowell, *Income Tax Laws*.

words, to fix, in the case of each of the duties under consideration, the limit of taxation, is the object of this Note.

For every taxing Act must have some limit to its operation. It is impossible to suppose that Parliament means to tax a particular kind of property, *e.g.*, legacies or land, under all circumstances, all the world over,<sup>1</sup> and, though we must in each case determine as far as possible from the language of each statute what are the limits within which Parliament intends to exercise its taxing power, one general remark may be made which applies to every tax now imposed by the Imperial Parliament.<sup>2</sup> This observation is, that, since the close of the contest with the American Colonies, Parliament has never intentionally taxed property which is wholly and exclusively connected with a country which, even though it belong to the British dominions, does not form part of the United Kingdom. In other words, the property on or in respect of which duties or taxes are imposed by Parliament is always property which has some territorial connection with the United Kingdom, or part thereof. The connection, indeed, with the United Kingdom, which renders property liable to taxation by the Imperial Parliament, may arise from various different causes. It may arise from the property being in fact situate in the United Kingdom;<sup>3</sup> from the owner of the property being or having been resident<sup>4</sup> or domiciled<sup>5</sup> in the United Kingdom; from the title to the property depending upon the law of some part of the United Kingdom, *i.e.*, in popular but not quite accurate language, upon British law;<sup>6</sup> or from the fact that some transaction connected with the property taxed has relation to the United Kingdom, as, *e.g.*, where income tax is charged on the profits of a trade exercised in the United Kingdom.<sup>7</sup> But though the circumstances which so connect property with the United Kingdom as to render it taxable are various, yet wherever property is taxable some connection always exists. The problem as regards any given duty, *e.g.*, legacy duty or estate duty, is to determine what is the circumstance which so connects property with the United Kingdom as to render it liable to the particular duty. The answer may be supplied by the express terms of the statute imposing the duty, or, what is more generally the case, the answer, not being given by the

<sup>1</sup> See particularly *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, 6, judgment of Cranworth, Ch.

<sup>2</sup> See 18 Geo. III. c. 12.

<sup>3</sup> Income Tax Act, 1853, s. 2, Schedules A and B. Compare Finance Act, 1894, ss. 1, 2.

<sup>4</sup> Income Tax Act, 1853, s. 2, Schedule D.

<sup>5</sup> Legacy Duty Act, 1796 (36 Geo. III. c. 52); *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1.

<sup>6</sup> Throughout this Note the term "British" is used as meaning belonging to the United Kingdom, and "foreign" as meaning not British, and "abroad" as meaning outside the United Kingdom.

<sup>7</sup> Income Tax Act, 1853, s. 2, Schedule D, para. 2; *Ericson v. Last* (1881), 8 Q. B. D. (C. A.) 414.

express terms of the taxing Act, must be inferred (with the aid, where obtainable, of judicial decisions) from the nature of the property taxed, and from the general terms and tenour of the statute or statutes imposing the duty or regulating the collection thereof.

In this Note we are dealing with taxes or duties each of which are imposed both on immovable property and on movable property.

#### IMMOVABLE PROPERTY.

The liability of immovable property or land, if otherwise chargeable with either death duties or duties of income tax, is determined wholly by its actual local situation.<sup>1</sup>

*Rule. Immovable property situate in the United Kingdom is liable to death duties and duties of income tax. Immovable property not situate within the United Kingdom is not liable to any of these duties.*

*This Rule is not affected by the domicile or residence of the owner of the property.*<sup>2</sup>

This principle might in fact be stated, as to its negative side, in an even broader form. An Act of the Imperial Parliament never imposes duties on or in respect of immovable property which is not situate in the United Kingdom.

Legacy duty<sup>3</sup> and succession duty are imposed on immovable property, *e.g.*, land and houses, if otherwise chargeable, throughout the United Kingdom, and (wide as are the terms of the enactments imposing these duties) are admittedly<sup>4</sup> not imposed on any immovable property whatever which is situate out of the United Kingdom. Estate duty, again, is charged in respect of property situate in any part of the United Kingdom, but as regards property situate out of the United Kingdom is charged only on property which is liable to legacy duty, or to succession duty,<sup>5</sup> and therefore is not charged on any foreign immovable.

Income tax, lastly, in so far as it is payable in respect of immovables, is, by the terms of Schedules A and B, expressly made payable in respect of the property and occupation respectively in or of "lands, tenements, hereditaments, and heritages, *in the United Kingdom.*"

The result is that, while land in London, in Dublin, in Edinburgh, in the Isle of Wight, or in Zetland, may be liable to the death duties or to income tax, land in Guernsey, or in the Isle of Man, is certainly not liable either to the death duties or to income tax.

<sup>1</sup> See, as to legacy duty, Hanson, 5th ed., pp. 28—30; Norman, p. 212; and *Chatfield v. Berchtoldt* (1872), L. R. 7 Ch. 192; and the principle there laid down clearly applies to succession duty and estate duty. As to income tax, see Income Tax Act, 1853, Scheds. A. and B., the operation of which is *eo nomine* confined to lands in the United Kingdom.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Chatfield v. Berchtoldt* (1872), L. R. 7 Ch. 192.

<sup>4</sup> Hanson, pp. 28—30.

<sup>5</sup> Finance Act, 1894, s. 2, sub-s. 2.

The principle, however, that duties are not imposed on or in respect of immovable property outside the United Kingdom must be taken subject to this limitation; that, though duties are not imposed by Parliament in respect of the ownership, possession, or devolution of foreign land, they may be, and certainly sometimes are, imposed on the proceeds or produce of foreign land and on interests, such as a debt secured by a mortgage on foreign land,<sup>1</sup> or the interest of a partner domiciled in England, in the land held by the partnership in India,<sup>2</sup> which are considered by English law to be movable property.<sup>3</sup>

Whenever in this Note it is stated that property is liable to a tax, or that duties are payable in respect of such property, the statement must always be taken subject to some such reservation as "if otherwise chargeable." When, for instance, it is asserted that immovable property situate in the United Kingdom is liable to death duties, what is meant is that to such property the Acts imposing the duties apply. It is not meant that such Acts impose duties upon all immovable property, without exception, within the United Kingdom.

#### MOVABLE PROPERTY.

##### (A) *Death Duties.*

The incidence of the different death duties is determined by different rules. The principle which fixes liability to legacy duty and to succession duty is, at any rate, not in all respects the same as the principles on which depends liability to estate duty.

##### *Legacy Duty and Succession Duty.*

The enactments imposing these duties do not in express terms fix the limit within which the Acts operate, or, in other words, the limit within which the duties are imposed.<sup>4</sup> It was, therefore, absolutely necessary to put some limit on the general terms imposing the duty: for "without such a limitation, the Legacy Duty Act, for example, "would have been applicable, although neither the testator nor the legatee, nor the property devised or bequeathed, was within or had any relation to the British dominions. A construction leading to "this result was obviously inadmissible."<sup>5</sup> And as some limitation must be found, that limitation, it has been judicially laid down, at

<sup>1</sup> *Lawson v. Commrs. of Inland Revenue*, [1896] 2 Ir. R. 418.

<sup>2</sup> *Forbes v. Steven* (1870), L. R. 10 Eq. 178.

<sup>3</sup> As to income tax, see *San Paulo Rail. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31; *De Beers Consolidated Mines, Ltd. v. Howe*, [1905] 2 K. B. (C. A.) 612; [1906] A. C. 455; and as to legacy duty and succession duty, see *Forbes v. Steven* (1870), L. R. 10 Eq. 178; *In re Stokes* (1890), 62 L. T. 176.

<sup>4</sup> See *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1; *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, 6—9, judgment of Cranworth, C.; *Colquhoun v. Brooks* (1889), 14 App. Cas. 493, 503, judgment of Herschell, C.

<sup>5</sup> *Colquhoun v. Brooks* (1889), 14 App. Cas. 493, 503, 504, judgment of Herschell, C.



any rate with regard to succession duty, "can only be a limitation "confining the operation of the words [imposing the duty] to persons "who become entitled by virtue of the laws of this country."<sup>1</sup> The limits, then, of taxation, in the case both of legacy duty and of succession duty, are determined by, or based upon, one and the same general principle, which may be thus expressed:—

*General Principle.* *Legacy duty and succession duty are imposed on that movable property, and on that movable property only, which the legatee, distributee, or, to use a more general term, the successor, claims under, or by virtue of, British law.*<sup>2</sup>

"The question," says Lord Cranworth in reference to a particular case, "is whether, where a person domiciled abroad makes a will "giving personal property" in this country by way of legacy, the "legatee is a person<sup>3</sup> becoming entitled to that property within the true "intent and meaning of the second section [of the Succession Duty "Act, 1853]. I think not. I think that, in order to be brought "within that section, he must be a person who becomes entitled by "virtue of the laws of this country. . . .

"The only safe way of solving this question [*i.e.*, the question as "to the limitation on the imposition of succession duty], as that "relating to legacy duty, is to consider the duty as imposed only on "those who claim title by virtue of our law."<sup>4</sup>

These words lay down the principle which at bottom determines the liability to legacy duty and succession duty. They also enable us to estimate the true position and worth of two other principles which have been suggested for determining, in the case of these duties, the limit of taxation.

The first of these suggested principles is that the limit ought to be fixed by the local situation of the deceased person's movable property. This contention is now clearly untenable; it may, however, contain a slight amount of truth. The local situation of a deceased person's movable property may occasionally—though this is by no means certain—be an element in determining whether the title of the successor depends upon British law, and therefore whether the property is or is not liable to succession duty.

A second suggested principle, which is still often laid down, is that liability to legacy duty and to succession duty depends, subject in the case of succession duty to various exceptions, upon the domicile of the deceased owner.

<sup>1</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, 9, judgment of Cranworth, C. "This country" means "England" in the particular case, but the principle laid down is clearly applicable to the United Kingdom.

<sup>2</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, 7, 8, judgment of Cranworth, C. For meaning of "British," see note 6, p. 748, *ante*.

<sup>3</sup> Which clearly means here "movable" property.

<sup>4</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, 7, 8, judgment of Cranworth, C.

That this statement always holds good in the case of legacy duty, and often holds good in the case of succession duty, is certain; yet domicil does not, it is submitted, of itself supply in either instance the ultimate ground of liability.

The explanations, it may be noted, of the dogma that liability depends on the deceased's domicil are of two kinds, and neither of them is satisfactory.

*First.* The doctrine is sometimes justified or explained by reference to the maxim *mobilia sequuntur personam*.<sup>1</sup> Acts of Parliament, it is said, are meant to impose duties on property situate within the United Kingdom; but movable property is (by a fiction of law) considered to be situate wherever the owner is domiciled. If, therefore, the owner is domiciled within the United Kingdom, his movables are situate in the United Kingdom, and, therefore, are subject to duty. If the owner is not domiciled in the United Kingdom, his movables are not situate there, and are not subject to duty. This view is recommended by its apparently placing the liability to duties on immovable property and on movable property upon the same basis, viz., the situation of the property, but this result is attained by an ambiguous and confusing use of terms. "Situation" is applied to immovable property in its natural sense of actual local position; whilst "situation" is applied to movable property as meaning the place where movable property is supposed by a fiction of law to be situate, viz., the country where the deceased owner was domiciled at the time of his death.

This explanation, moreover, does not really explain the only matter which needs explaining. For the point to be made clear is, why it is that in a particular case movables are treated as subject to the law, not of the country where they are situate, but of the owner's domicil; and the maxim *mobilia sequuntur personam*, being merely a short form of stating the fact that movables are for some purposes treated, whatever their actual situation, as subject to the law of their owner's domicil, cannot serve as an explanation of the reason why in any particular case they are so treated. The general statement of a fact cannot, that is to say, explain part of the fact which it states.

*Secondly.* The rule in question is sometimes again rested on the ground that some limit must be placed on the class of persons to whom the Acts imposing legacy duty and succession duty are intended to apply. These enactments are not intended to apply to all the world, and the most natural assumption is, it is argued, that the persons intended to be within their scope are persons domiciled in England.<sup>2</sup> There is, perhaps, some difficulty in seeing why the particular limitation of domicil should necessarily have been adopted; and, further, if taxes on succession are looked upon as taxes on persons rather than

<sup>1</sup> See Hanson (3rd ed.), pp. 16, 17; and conf. Hanson (5th ed.), pp. 478, 483.

<sup>2</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1.

on property, why such a tax should affect the real property in England of a person domiciled in a foreign country. This view also, whatever its worth, does not explain the cases in which the movables of a person not domiciled in the United Kingdom are liable to succession duty.<sup>1</sup>

Our general principle,<sup>2</sup> however, explains both the cases in which the domicile of a deceased person does,<sup>3</sup> and the cases in which it does not determine the liability of his movable property to one or other of the duties under consideration. The explanation is this: in many instances (*e.g.*, in every case where the liability of movables to legacy duty is in question)<sup>4</sup> the domicile of the deceased determines what is the law in virtue of which a person is entitled to succeed to the deceased's movable property, and therefore indirectly determines whether such property is or is not liable, as the case may be, to legacy duty or to succession duty; but in other instances the domicile of the deceased may not determine<sup>5</sup> what is the law in virtue of which another person is entitled to succeed to the deceased's movable property, and therefore often does not determine whether such property is or is not liable to succession duty. The cases, in short, in which a successor's liability is apparently determined by the domicile of the deceased, as also the cases in which it is not so determined, are applications and illustrations of the general principle that liability depends upon the result of the inquiry whether a successor's title does or does not depend upon British law.

But, though one and the same principle at bottom governs liability both to legacy duty and succession duty, this principle gives rise to different rules in regard to each duty.

#### *Rules as to Legacy Duty.*<sup>6</sup>

*Rule 1. The movable property of a deceased person who has not died domiciled in the United Kingdom is, wherever locally situate, not liable to legacy duty.*<sup>7</sup>

This rule holds whether the deceased has died intestate or testate. It is a clear application of our general principle, for the title of the distributee or legatee to the property of the deceased depends on the deceased's *lex domicilii*,<sup>8</sup> and therefore, as he has died domiciled out of the United Kingdom, does not depend on British law.

<sup>1</sup> *Attorney-General v. Campbell* (1872), L. R. 5 H. L. 524, 529, 530; *In re Cigala's Trusts* (1878), 7 Ch. D. 351, 354, remark of Jessel, M. R.

<sup>2</sup> See p. 751, *ante*.

<sup>3</sup> See *Attorney-General v. Jewish Colonisation Association*, [1900] 2 Q. B. 556; [1901] 1 Q. B. (C. A.) 123. Property may (*semble*) be liable to succession duty even though the successor is not entitled *exclusively* under English law.

<sup>4</sup> See chap. xxxi., *ante*.

<sup>5</sup> See pp. 756—760, *post*.

<sup>6</sup> *I.e.*, Rules 1 and 2.

<sup>7</sup> *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1.

<sup>8</sup> See chap. xxxi., *ante*.

*D* has died domiciled in Demerara, possessed of movable property situate in Scotland. The property is not liable to legacy duty.<sup>1</sup>

*Rule 2. The movable property of a deceased person who has died domiciled in the United Kingdom is, wherever locally situate, liable to legacy duty.*<sup>2</sup>

This rule holds whether the deceased has died intestate or testate. It is a clear application of our general principle.

1. The deceased has died resident in India, but domiciled in England. All his movable property is situate in India. The whole of the property is liable to legacy duty.<sup>3</sup>

2. *D*, domiciled in England, is a partner in a firm carrying on business at Bombay, where the firm holds freehold land, which is a partnership asset and (under English law) personal property. After *D*'s death the freehold land is sold, and *D*'s share in the purchase-moneys transmitted to *D*'s personal representatives in England. The share is liable to legacy duty.<sup>4</sup>

3. *D* dies domiciled in England, being partner with his brother in a sheep farm in New Zealand. Part of the partnership property is freehold land in New Zealand. On the death of his brother, *D* is entitled to four-sevenths of partnership property. *D* devises his share to trustees in trust to sell, and with powers of management till sale, and upon trust to divide the produce till the sale among thirteen charities in England. The partnership property is not sold, but the income thereof is paid into the High Court. The funds in Court are divided among the charities. The whole fund is liable to legacy duty.<sup>5</sup>

#### *Rules as to Succession Duty.*<sup>6</sup>

*Rule 3. Movable property wherever situate, which a successor claims under a will, or under the intestacy of a deceased person dying domiciled out of the United Kingdom, is not liable to succession duty.*

Under this rule, movable property which, on account of the deceased

<sup>1</sup> *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1.

<sup>2</sup> *In re Ewin* (1830), 1 C. & J. 151; *Attorney-General v. Napier* (1851), 6 Ex. 217; 20 L. J. Ex. 173.

<sup>3</sup> *Attorney-General v. Napier* (1851), 6 Ex. 217.

<sup>4</sup> *Forbes v. Steven* (1870), L. R. 10 Eq. 178; *i.e.*, the interest of the partner in the partnership assets is held to be movable property; *conf. judgment of James, V.-C.*, pp. 188, 192.

<sup>5</sup> *In re Stokes* (1890), 62 L. T. 176. This case and *Forbes v. Steven* are (*semble*) to be explained on the ground that *D*'s claim is a right to a share, not in land (immovable property), but in the value of the whole partnership property, which is movable property. But the cases are not quite satisfactory (compare *Nelson*, p. 380). The fact that real property held by a partnership is treated by English law as personal property does not seem to be enough to convert the proceeds of immovable property situate abroad into movable property. Whether freehold land in India held by a partnership is to be treated as movable property, and therefore to be subject to legacy duty, would seem on principle to depend upon the law of British India rather than of England (?).

<sup>6</sup> *I.e.* Rules 3—5.

owner's foreign domicile, is exempt from legacy duty,<sup>1</sup> is not liable to succession duty. This appears to be the whole effect of the decision in *Wallace v. Attorney-General*. "No one reading the Succession Duty Act could suppose that, though it had no effect on legatees under the wills of testators domiciled in this country, it yet would, by changing the name of legacy into that of succession, totally alter the rights of persons claiming title to personal property in this country under the wills [or under the intestacy] of persons domiciled abroad."<sup>2</sup>

The rule, be it noted, applies only to "wills" in the strict sense of that term, and not to wills made in exercise of a power of appointment conferred by an English instrument.<sup>3</sup>

*D* dies domiciled in France, having bequeathed movable property situate in England to *A*. The property is not liable to succession duty.<sup>4</sup>

*Rule 4.*<sup>5</sup> *Movable property, wherever actually situate, which a successor claims under a will or other instrument executed by a person dying domiciled in the United Kingdom, is (in general) liable to succession duty.*

This rule seems a fair result of the general principle that property to which a person succeeds under or by virtue of British law is, if otherwise chargeable, liable to succession duty; for where a successor claims property under a will or settlement made by a person dying domiciled in the United Kingdom, he (*prima facie*, at any rate) claims under British law.

Thus *D* dies domiciled in England. Whilst residing in one of the United States, he makes a settlement in favour of *A*, under which, on the death of *D*, *A* succeeds to movable property, some of which is situate in England, some is situate in the United States, and some is situate in France. On *D*'s death the whole of the property is liable to succession duty.

It is, however, possible that cases may arise where property to which a person succeeds on the death of and under an instrument executed by a person who dies domiciled in the United Kingdom may not be liable to succession duty.

"In the case," writes Mr. Hanson, "of foreign property which the owner settles by deed at a time when he is domiciled abroad,

<sup>1</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, with which contrast *Re Lovelace* (1859), 4 De G. & J. 340.

This Rule is an inference from *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, 9, judgment of Cranworth, C.

<sup>2</sup> L. R. 1 Ch. pp. 1, 9, judgment of Cranworth, C.

<sup>3</sup> *In re Lovelace* (1859), 4 De G. & J. 340. See, as to testamentary instruments in exercise of a power of appointment, Rules 188, 189, pp. 687—692, *ante*.

<sup>4</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1; *Jeves v. Shadwell* (1865), L. R. 1 Ch. 2. Compare remarks on this decision of Romilly, M. R., *Lyall v. Lyall* (1872), L. R. 15 Eq. 1.

<sup>5</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1.

“and which remains abroad, and is distributed there in accordance with the settlement. after his death, no duty is payable, notwithstanding that the settlor had, previously to the time of distribution, acquired a domicile in this country, for, by the execution of the settlement he divested himself of his ownership, so that the property thenceforward ceased to be his, in such a sense as to follow his person; and, consequently, the situation of his domicile can have no further effect in determining the situation of any property which has thus been disposed of in his lifetime.”<sup>1</sup> The supposed case is rather vaguely stated. Under the circumstances, however, which it suggests, the result arrived at by Mr. Hanson probably follows, namely, that the settled property is not, on the settlor’s death, liable to succession duty. The true reason, however, of this would seem to be that, though the settlor was at his death domiciled in England, the successor’s title to the property does not depend on British law. Movable property, it should be noted, to which a person succeeds under a will made by a testator domiciled in the United Kingdom, must almost always be liable to legacy duty, and therefore can rarely, if ever, be liable to succession duty.<sup>2</sup>

*Rule 5.*<sup>3</sup> *The movable property, wherever situate, of a deceased person not dying domiciled in the United Kingdom, is liable to succession duty if the successor is entitled to the property under a British trust or settlement and therefore under British law.*

This rule is a direct application of the general principle already laid down,<sup>4</sup> and covers at least three different cases.

*First Case.*—Where there is a succession to movable property situate in the United Kingdom under the will of a person domiciled out of the United Kingdom, who has a mere power under a British settlement or will of disposing of the property, the property is liable to succession duty.<sup>5</sup>

Under an English marriage settlement, money is assigned to trustees to hold upon certain trusts during the lives of *D* and *M*, and, further, on the death of the survivor, upon such trusts as *D* should by deed or will appoint. *D* and *M* are at the time of their marriage British subjects domiciled in England. After the marriage they acquire and retain till the end of their lives a domicile in France. *D* exercises by will the power of appointment in favour of *A* and *B*, French subjects

<sup>1</sup> Hanson (3rd ed.), p. 24.

<sup>2</sup> Succession Duty Act, 1853, s. 18. See Hanson (5th ed.), p. 484.

<sup>3</sup> See *In re Wallop's Trusts* (1864), 33 L. J. Ch. 351; 1 De G. J. & S. 656; *In re Lovelace* (1859), 4 De G. & J. 340; *Attorney-General v. Campbell* (1872), L. R. 5 H. L. 524; *In re Badart's Trusts* (1870), L. R. 10 Eq. 288; *Lyall v. Lyall* (1872), L. R. 15 Eq. 1; *In re Cigala's Settlement* (1878), 7 Ch. D. 351; *Attorney-General v. Felce* (1894), 10 Times L. R. 337. Compare Norman, pp. 113, 114.

<sup>4</sup> See p. 751, *ante*.

<sup>5</sup> *In re Wallop's Trusts* (1864), 33 L. J. Ch. 351; 1 De G. J. & S. 656; *In re Lovelace* (1859), 28 L. J. Ch. 489; 4 De G. & J. 340.

domiciled in France. On the succession of *A* and *B*, the property is liable to succession duty.<sup>1</sup>

An Englishman domiciled in England has left 5,000*l.* in the funds in trust to pay the interest to his daughter for life, and on her death to pay over the fund to such persons as she may by will appoint. *D*, the daughter, marries a person domiciled in Jersey, and herself dies there domiciled. She leaves the money in question to her husband, who, at the time of her death, is domiciled in Jersey. The 5,000*l.* is liable to succession duty.<sup>2</sup>

Each of the foregoing illustrations, and the decisions on which they are based, viz., *In re Lovelace*<sup>3</sup> and *In re Wallop's Trusts*<sup>4</sup> respectively, rests at bottom on the same ground, viz., that the successor claims in virtue, not of a will strictly speaking, but of a testamentary appointment made under an English instrument which must necessarily be construed by English law; in other words, the successor is entitled under English law. "This decision" (viz., the decision in *Wallace v. Attorney-General*), says Lord Cranworth, "does not conflict with . . . *Re Lovelace* and *Re Wallop's Trusts*. They were both cases of "testamentary appointment under English instruments, not of wills; "and such an instrument must necessarily be construed by our own laws, "not by that of the domicile of the person executing the power."<sup>5</sup>

*Second Case.*—Where there is a succession to movable property bequeathed by a testator who is not domiciled in the United Kingdom, which under his will is invested by his executors in England under certain trusts, and it subsequently devolves on successors claiming to succeed to this invested fund under the trust created by the will, the property is liable to succession duty.<sup>6</sup>

*D*, an Englishman domiciled in Portugal, appoints executors, and directs them to collect his property in Portugal, pay certain legacies to *A* and others, and invest the residue in English three per cents., appropriating a part to purchasing a life annuity for *M*, which part is, on *M*'s death, to devolve on *B*. No legacy duty or succession duty is payable by *A* or *M*, but succession duty is payable by *B*.<sup>7</sup>

The difference between the position of *A* and of *B* is noticeable.

<sup>1</sup> *In re Lovelace* (1859), 28 L. J. Ch. 489; 4 De G. & J. 340.

<sup>2</sup> See *In re Wallop's Trusts* (1864), 33 L. J. Ch. 351; 1 De G. J. & S. 656.

<sup>3</sup> (1859), 4 De G. & J. 340; 28 L. J. Ch. 489.

<sup>4</sup> (1864), 1 De G. J. & S. 656; 33 L. J. Ch. 351.

<sup>5</sup> *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1, 9, judgment of Cranworth, C. The words I have underlined contain the gist of the whole matter. They hold good even though the cases differ in this fact, viz., that the successor in *Re Lovelace* derived his title, under the instrument creating the power, from the donor, whilst the successor in *Re Wallop's Trusts* (in virtue of the Succession Duty Act, 1853, s. 4) derived his title from the testator, i.e., the donee of the power by whom it was exercised.

<sup>6</sup> *Attorney-General v. Campbell* (1872), L. R. 5 H. L. 524.

<sup>7</sup> *Ibid.*

*A*'s case falls under Rule 3,<sup>1</sup> and not under Rule 5. He therefore pays no duty. *B*'s case falls within Rule 5. The money is invested in English funds, and, though *B*'s title originates in a will made by *D* domiciled in a foreign country, *B*'s succession to the property is a succession under English law. *B*, therefore, pays succession duty.

The position of *B* has been explained as follows:—

“In order to have the personal property administered, you must seek the forum of that country where the person whose property is in question had acquired a domicile. Then, when you obtain possession of that property, you do all which has to be done in the country to which the testator belonged. The question is afterwards, when the property has been so obtained and administered, and is in the state in which the testator desired it to be placed, in what condition do you find the fund? You find it in the condition of a settled fund. That condition arises, no doubt, from the operation of the testator's will; but I can see no difference, in consequence of that circumstance, from its having arisen in any other manner, as, for instance, from a deed executed in his lifetime, as might have been the case, or, supposing he had transmitted to his bankers a sum of money to be invested upon the same trusts. When there is any fund standing in this country in the names of trustees in Consols or other property, which has a *quasi* local settlement, which stock in the funds has, all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to succession duty. The settlement provides for the succession, and the interest of each person on coming into possession is liable to the payment of duty upon that interest to which he so succeeds.”<sup>2</sup>

“If a man dies domiciled abroad possessed of personal property, the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicile, and that on the principle of *mobilia sequuntur personam*. His domicile sets up the forum of administration. Now, apply that to the present case. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country and investing it here in Consols, which they are directed to hold upon

<sup>1</sup> Compare Rule 1, p. 753, *ante*.

<sup>2</sup> *Attorney-General v. Campbell* (1872), L. R. 5 H. L. 524, 528, per Hatherley, C. How far is the case really affected by the local situation of the fund? *Semble*, the result would have been the same if the settled fund had been invested in French *rentes*. Compare *In re Cigala's Settlement* (1878), 7 Ch. D. 351, and *Attorney-General v. Felce* (1894), 10 Times L. R. 337.



"certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality. That settlement, so made, undoubtedly becomes subject to the rules of English law under which it is held, by virtue of which it is enjoyed, and under which it will be ultimately administered. That, therefore, is a description of ownership which falls immediately within the provisions of the Succession Duty Act."<sup>1</sup>

*D*, by a marriage settlement executed in England, assigned to trustees, all domiciled and resident in England, an English policy of assurance for 2,000*l.*, and a sum of 1,000*l.* Consols, and covenanted to pay the trustees 1,000*l.* within three years. The trustees held the trust funds upon trust to pay interest to *D*'s wife for life, upon her death to *D* for life, and upon the death of both of them to divide the funds among the children of the marriage. *D* and his wife were domiciled in New South Wales. In 1850 *D*, by his will, appointed executors in New South Wales, and directed them to collect his residuary estate and transmit it to his executors in England, who were to invest the sums transmitted in English funds, pay the income to *D*'s wife for life, and after her death to divide the capital among *D*'s children on their attaining twenty-one.

In 1853 *D* died domiciled in New South Wales, and three months afterwards his wife died, also domiciled in New South Wales. They left only one child, *A*, also domiciled in New South Wales.

It was held that *A*, *first*, was liable to succession duty on funds to which he was entitled under the settlement; *secondly*, was not liable to succession duty on the funds to which he was entitled under the will.<sup>2</sup> *A* was liable to duty for his succession under the settlement, since he succeeded to it in virtue of English law. He was not liable to duty in respect of the funds which he obtained under the will, since he succeeded to them under foreign law.

*Third Case.*—Where there is a succession to movable property comprised in a British settlement vested in trustees, subject to British jurisdiction and recoverable in a British Court, the property is liable to succession duty.

*D*, an alien domiciled in Austria, gives by deed in the English language and form to an English company constituted under the Companies Acts, and having a registered office in London, stocks and

<sup>1</sup> *Attorney-General v. Campbell* (1872), L. R. 5 H. L. 524, 529, 530, per Lord Westbury. See *In re Badart's Trusts* (1870), L. R. 10 Eq. 288.

<sup>2</sup> *Lyall v. Lyall* (1872), L. R. 15 Eq. 1.

other securities, mainly foreign securities, on the terms that the company should during *D*'s lifetime permit *D* to receive the income thereof, and should transfer, exchange, dispose of and deal with such securities as directed by *D*, and should after his death apply the same for the benefit of Russian Jews, &c. The company is formed for carrying out the purposes of the trust. The whole of the company's business is under the articles of association carried on at the principal office of the company in Paris, and practically under the direction of *D*. *D* dies domiciled in Austria. At the time of his death most of the securities subject to the deed are foreign securities situate abroad, and the documents of title thereto are also situate abroad. Both succession duty and estate duty<sup>1</sup> are at *D*'s death payable on all the property subject to the trust.<sup>2</sup>

Under the Wills Act, 1861 (24 & 25 Vict. c. 114), a will may be valid in England though not valid by the law of the testator's domicile.<sup>3</sup> It has, therefore, been suggested that if a British subject dies domiciled abroad, and makes a will which is valid only in virtue of the Wills Act, 1861 (*i.e.*, which owes its validity to the law of England), and his movables are either locally situate here at the time of his death, or are remitted here in accordance with his will, they may be liable to succession duty, inasmuch as the title of the persons claiming under the will depends wholly on the law of this country.<sup>4</sup> This suggestion is certainly ingenious and worth consideration. The answer to it, however, would appear to be that the successor in the case supposed does not base his title wholly on the law of this country. The validity of the will as to the testator's capacity and the nature of its provisions would appear, as already pointed out,<sup>5</sup> to depend on the law of the testator's domicile.

#### *Rules as to Estate Duty.*<sup>6</sup>

As regards the limit of taxation in respect of movable property, there exists an essential difference between legacy duty and succession duty on the one hand, and estate duty on the other.

<sup>1</sup> See p. 762, *post*.

<sup>2</sup> *Attorney-General v. Jewish Colonization Association*, [1900] 2 Q. B. 556; [1901] 1 Q. B. (C. A.) 123. Compare *In re Cigala's Settlement* (1878), 7 Ch. D. 351; *Attorney-General v. Felee* (1894), 10 T. L. R. 337.

If, in the circumstances occurring in *Attorney-General v. Jewish Colonization Association*, *D* had retained his property absolutely in his own hands, and employed it during his lifetime for exactly the same objects for which, and in the manner in which, the property was in fact employed by the Association under his direction, but had left it by will to a company already constituted on the same trusts as the trust created under the deed of settlement, the property would, except as to any securities situate in the United Kingdom, (*semble*) have been liable neither to legacy, succession, nor estate duty. Whether, under the settlement made, the property escaped liability to duties under Austrian law, is a question as to which it is unnecessary to form an opinion.

<sup>3</sup> See Rule 185, Exceptions 1, 2, and Rule 187, pp. 669, 673, 677, 680, *ante*.

<sup>4</sup> Hanson (5th ed.), p. 483.

<sup>5</sup> See pp. 669, 672, *ante*.

<sup>6</sup> *I.e.*, Rules 6, 7, *post*. See Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2.

In the case of legacy duty and succession duty the limit of taxation is, whatever be the situation of the property, fixed in accordance with one and the same general principle.<sup>1</sup>

In the case of estate duty, the limit of taxation is fixed on one principle in reference to property locally situate in the United Kingdom, and on another principle with reference to property locally situate out of the United Kingdom. The incidence, that is to say, of estate duty as regards property situate in the United Kingdom is determined, as was the incidence of probate duty, by the local situation of the property. The incidence of estate duty as regards property situate out of the United Kingdom is governed by the principle which determines the incidence of legacy duty or succession duty, *i.e.*, of that property alone being taxable which is claimed under or by virtue of British law.<sup>2</sup>

Rule 6 refers to movable property situate in the United Kingdom. Rule 7 refers to movable property situate out of the United Kingdom.

*Rule 6. Movable property passing on the death of any person dying on or after the 2nd day of August, 1894 (called hereinafter the deceased), which is situate in the United Kingdom, is liable to estate duty.*<sup>3</sup>

*This Rule is not affected by the domicile<sup>4</sup> of the deceased.*

In order to be liable within this rule, movable property must, first, be situate in the United Kingdom, and, secondly (*semble*), be situate in the United Kingdom at the time when it passes, *i.e.*, speaking generally, at the time of the death of the deceased.

*Place.*—The local situation of the property must, apparently, be settled in accordance with the maxims which have hitherto determined whether property is or is not so locally situate in the United Kingdom as to be liable to probate duty, or, what is at bottom the same thing, as to give the Court jurisdiction to grant letters of administration or probate.<sup>5</sup> This, at least, is the inference which may fairly be drawn from the Finance Act, 1894, s. 8, sub-s. 1; and, independently of the provisions of sect. 8, the conclusion suggests itself that the Courts, in default of other guidance, will determine the local situation of property, in respect of its liability to estate duty, in accordance with the rules which have guided them in determining the local situation of property in regard to its liability to probate duty. It follows, therefore, that the technical rules as to the local situation of property established by decisions or enactments having reference to probate duty are still in force as regards estate duty, and apply whenever the duty is claimed on the ground of the deceased's property

<sup>1</sup> For this principle see p. 751, *ante*.

<sup>2</sup> See p. 751, *ante*, and Finance Act, 1894, s. 2, sub-s. 2.

<sup>3</sup> See Finance Act, 1894, ss. 1, 2.

<sup>4</sup> See *New York Breweries Co. v. Att.-Gen.*, [1899] A. C. 62, which, though it refers to probate duty, is applicable to estate duty.

<sup>5</sup> See particularly, pp. 309—314, *ante*.

being locally situate in the United Kingdom. Hence, to give one example of my meaning, the answer to the question whether a debt due to the deceased on a bond is or is not liable to estate duty may, under conceivable circumstances, *e.g.*, where the deceased dies domiciled in a foreign country and intestate, depend on the rule that the local situation of a specialty debt is determined by the local situation of the deed under which it is due,<sup>1</sup> and also on the modification introduced into that rule by the Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39.

*Time.*—It would appear, though this is not stated in the Act, that property, in order to be liable to estate duty in the character of property situate in the United Kingdom, must be there situate at the time when the property passes, *i.e.*, in general, at the death of the deceased. The words “in general” must be noticed, for it may sometimes happen that property which in fact passes *before* a deceased person’s death is under the Finance Act, 1894, s. 2, sub-s. 1 (c), to be treated as “property passing on the death of the deceased.”

*Rule 7.<sup>2</sup> Movable property passing on the death of the deceased, when situate out of the United Kingdom, if under the law in force before the passing<sup>3</sup> of the Finance Act, 1894, legacy duty or succession duty is payable in respect thereof, or would be so payable but for the relationship<sup>4</sup> of the person to whom it passes, is liable to estate duty.*

This is, it is submitted, the effect of the Finance Act, 1894, ss. 1 and 2. The result is arrived at as follows: Section 1 imposes estate duty on all property which passes on the death of the deceased, *i.e.*, of any person dying on or after August 2, 1894. Section 2, sub-s. 1, gives a wide extension to the term “property passing on the death of the deceased”; whilst sub-s. 2 provides that “property “passing on the death of the deceased, when situate out of the United Kingdom, shall be included [in the term ‘property passing on the “death of the deceased”] *only*, if, under the law in force before the “passing of [the Finance Act, 1894], legacy or succession duty is “payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes.”<sup>5</sup> The language of the enactment is awkward, but its meaning is pretty clear. All property passing on the death of the deceased which is situate in the United Kingdom is liable to estate duty: but property passing on the death of the deceased which is situate out of the United Kingdom is liable to

<sup>1</sup> See *Commissioner of Stamps v. Hope*, [1891] A. C. 476.

<sup>2</sup> See Finance Act, 1894, s. 2, sub-s. 2.

<sup>3</sup> *I.e.*, 31 July, 1894.

<sup>4</sup> See as to the exemption of property passing to husband or wife of deceased from estate duty, 55 Geo. III. c. 184, Sched. pt. iii.; Hanson (5th ed.), p. 467; and from succession duty, Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18; Hanson, p. 596.

<sup>5</sup> Finance Act, 1894, s. 2, sub-s. 2.

estate duty if liable to legacy duty or succession duty, and, subject to a slight reservation, not otherwise; this reservation is, that property out of the United Kingdom, which escapes legacy duty and succession duty only on account of the relationship of the person to whom it passes, remains liable to estate duty. Movable property, therefore, situate out of the United Kingdom is liable to estate duty if, on account of the domicile of the deceased, or from any other cause, it is liable either to legacy duty or to succession duty. In other words, movable property situate out of the United Kingdom is liable to estate duty if liable to legacy duty or succession duty under Rules 1 to 5,<sup>1</sup> and not otherwise; or, to put the same thing in a more general form, property which is situate out of the United Kingdom is liable to estate duty if the person to whom it passes is entitled to it, or claims it under British law; it is not liable if he is neither entitled nor claims it under British law.

If we now combine Rules 6 and 7, we shall find that the liability of property passing on the death of a deceased person to estate duty depends on one of two different things—*first*, on the local situation of the property, *i.e.*, on its being situate in the United Kingdom; and, *secondly*, when it is not so situate, on the successor being entitled thereto under British law.

Hence, if *D* dies intestate at Melbourne, in Victoria, leaving movable property, *e.g.*, goods, in England, in Victoria, and in France, the result as regards the liability to estate duty of the property which passes on his death is as follows: Whatever be *D*'s domicile, the English goods are liable. The liability of the Victorian and the French goods depends in effect on *D*'s domicile; if *D* dies domiciled in the United Kingdom, his Victorian and French goods are liable to legacy duty, and therefore, also, to estate duty; if *D* does not die domiciled in the United Kingdom, then his Victorian and French goods, not being liable to legacy duty nor presumably to succession duty, are not liable to estate duty. This general statement must be taken subject to two reservations.

It is possible, in the first place, that the whole or part of the Victorian or French goods may, though *D* is not domiciled in England, be liable to succession duty,<sup>2</sup> in which case they will wholly or in part be liable to estate duty.

Certain deductions from estate duty, in the second place, may be allowed in respect of death duties to which *D*'s property may be liable in France or in Victoria respectively.<sup>3</sup>

<sup>1</sup> See pp. 753—756, *ante*.

<sup>2</sup> See Rule 5, p. 756, *ante*.

<sup>3</sup> As to the deductions allowable from estate duty in respect of death duties payable on property situate (1) in a strictly foreign country (*e.g.*, France), see Finance Act, 1894, s. 7, sub-s. 4; or (2) in a British possession (*e.g.*, Victoria), see Finance

*Question.—Within what limit does estate duty fall on, or is payable in respect of, property passing before death, e.g., by gift?*<sup>1</sup>

Estate duty is payable, in general, only in respect of property which in fact “passes on the death” of a deceased person; but to prevent evasion of the duty, the Finance Act, 1894, in effect provides<sup>2</sup> that in certain cases, *e.g.*, where a person within twelve months of his death makes an out-and-out gift of his property (*e.g.*, a diamond ring), the property shall be considered, as regards liability to estate duty, as “passing on his death.” Hence estate duty is in reality in these instances payable in respect of property which passes before a deceased person’s death.

Within what limits, however, are the provisions of the Finance Act, as to property thus passing before a person’s death, *e.g.*, by gift, meant to operate? Do they affect the property of all persons who leave behind them personal estate situate in the United Kingdom? Do they affect property which is situate out of the United Kingdom at the time when the transaction, *e.g.*, the gift, by which it is transferred, takes place? These and the like inquiries do not admit of a decisive answer. A conjectural reply to them must be found by keeping in mind the following considerations. The property, in the first place, which passes, *e.g.*, a diamond ring given by *D* to *A* within a week of *D*’s death, in fact, before, but, as regards liability to estate duty, on the death of a deceased person, must be dealt with exactly as though it actually passed on the deceased’s death. The Finance Act, in the second place, whilst, in the cases under consideration, it treats property as passing on the death of the deceased, though in fact it pass to another before his death, does not in any way affect the local situation of such property either when it passes or at the time of the deceased’s death. In the last place, an enactment intended to guard against the evasion of estate duty can hardly apply to any person who, at the time of the transaction, *e.g.*, the gift, by which his property passes, is neither by his own domicile or residence or presence in the United Kingdom, nor by the fact of the property itself being in the United Kingdom, subject to British law.

The questions which may arise, and the probable answers thereto, may best be understood from an examination of some imaginary cases.

In each of these cases, *D* has within a week of his death made an out-and-out gift to *A* of a diamond ring worth 1,000*l.* by handing it to *A*, and has subsequently died intestate, leaving a large amount of property in the United Kingdom. The point to be determined in each instance is whether estate duty is payable in respect of the diamond

Act, 1894, s. 20. As to deductions in respect of debts due from deceased, &c., see sect. 7, sub-ss. 1—3.

<sup>1</sup> See Finance Act, 1894, s. 2, sub-s. 1 (c). Customs and Inland Revenue Act, 1881, s. 38, as amended by 52 & 53 Vict. c. 7.

<sup>2</sup> Sect. 2, sub-s. 1 (c).

ring. The decision thereof depends on the correct interpretation of the Finance Act, 1894, ss. 1 and 2, and especially of s. 2, sub-s. 1 (c), with which must be read the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38.

*Case 1.*—*D*, both at the time of making the gift and at the time of his death, is domiciled in the United Kingdom. The ring is in England at the time of the gift and at the time of *D*'s death.

Estate duty is payable. The ring, in fact, no doubt passed to *A* before *D*'s death, but, as regards the liability of *D*'s estate to estate duty, must be treated as passing on *D*'s death.

*Case 2.*—*D* is a Frenchman domiciled in France, as also is *A*. The gift takes place at Paris, but before *D*'s death *A* comes to England, and the ring is in England at the time of *D*'s death.

*Semble*, estate duty is not payable. *D* being a Frenchman domiciled in France at the time when the gift takes place, the whole transaction is a French transaction, and probably falls wholly outside the Finance Act, 1894, ss. 1 and 2, or, in other words, *D* is in respect of this gift to be treated as a person not subject to British law.

Still this conclusion is, it is submitted, by no means certain. The case comes within the words of the sections imposing the duty. At the time of *D*'s death, the ring is, as a matter of fact, situate in England. It is to be treated, if the Act applies to the case at all, as passing on *D*'s death.<sup>1</sup> The property passing, therefore, *i.e.*, the ring, comes within the Finance Act, 1894, s. 2, sub-s. 1, which governs property situate in the United Kingdom, and does not come within the Finance Act, 1894, s. 2, sub-s. 2, which refers only to property passing on the death of the deceased when situate out of the United Kingdom.

*Case 3.*—*D* is a Frenchman domiciled in France. He gives the ring to *A*, another Frenchman, also domiciled in France, whilst they are both staying for a day or two in England. The ring is in England at the time of *D*'s death.

Estate duty, it would seem, is payable.

*Case 4.*—The circumstances are the same as in Case 3, except that the ring is in France at the time of *D*'s death.

Estate duty is (*semble*) not payable. The ring is not situate in England at the time of *D*'s death, and if it can be treated, under the Finance Act, 1894, s. 2, sub-s. 1 (c), as property passing on *D*'s death, it still must be considered as property passing when situate out of the United Kingdom, but it would not, even had it passed as a legacy, have been liable to legacy or succession duty. The ring, therefore, it is submitted, is in no point of view chargeable with estate duty.

These illustrations apply directly only to the case of a gift made by

<sup>1</sup> See Finance Act, 1894, s. 2, sub-s. 1 (c), and Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (a).

a person within twelve months of his death. They suggest, however, the kind of problems which may be raised as to the limit within which the Finance Act, 1894, s. 2, sub-s. 1 (c), affects property within its scope.

(B) *Duties of Income Tax.*<sup>1</sup>

Income tax, in so far as it is chargeable on movable property, is imposed under or in accordance with Schedules (C)<sup>2</sup>, (D)<sup>3</sup>, and (E),<sup>4</sup> and is in effect a tax on annual profits or gains, *i.e.*, income, derived from various sources, *e.g.*, from public revenues, from property<sup>5</sup> or possessions, from interest,<sup>6</sup> from public offices of profit, &c.<sup>7</sup> With most of the questions which arise under these schedules, this Note has no concern whatever. Its aim, as far as it is concerned with income tax, is to establish from the Income Tax Acts as interpreted by judicial decisions, that the limit of taxation in regard to incomes is in reality fixed, in the main at any rate, by three principles, which may be thus broadly summed up: *first*, income tax is payable on any income arising from a British source; *secondly*, income tax is payable on any income which, though not arising from a British source, is the income of any person resident in the United Kingdom, and is actually received in the United Kingdom; *thirdly*, income tax is, in general, not payable on any income which is not taxable under one or other of the two foregoing principles. No one of these three principles is, it must be admitted, expressed in so many words in the Income Tax Acts, nor even in the judgments interpreting these Acts. The method by which it is attempted to establish in this Note that these principles, in fact, fix the limit of taxation under Schedules (C), (D), and (E) is first to state each principle with sufficient accuracy for our purpose, and then to show how it applies to taxation under each of these schedules. It will be found convenient to deviate a little from the arrangement of the Income Tax Acts, and to apply each principle first to Schedule (D), which is the main or leading schedule of charge, and secondly to Schedules (C) and (E) respectively, which are little more than supplementary schedules.

<sup>1</sup> Commissioners of Income Tax, as they have jurisdiction to assess an English company to income tax in respect of profits of business carried on either wholly or in part in the United Kingdom (Income Tax Act, 1842, s. 106), have also jurisdiction to decide questions of fact necessary for ascertaining the amount of the whole of the profits. If the decision is erroneous in point of law, the remedy is by way of appeal on a case stated, but not by prohibition. *R. v. General Commissioners of Taxes for Clewkenwell*, [1901] 2 K. B. (C. A.) 879.

<sup>2</sup> Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, and Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 88—99.

<sup>3</sup> Income Tax Act, 1853, s. 2, and Income Tax Act, 1842, ss. 100—102.

<sup>4</sup> Income Tax Act, 1853, s. 2, and Income Tax Act, 1842, s. 146.

<sup>5</sup> Income Tax Act, 1853, s. 2, Sched. (C).

<sup>6</sup> *Ibid.*, Sched. (D).

<sup>7</sup> *Ibid.*, Sched. (E).



*First Principle.*—Income tax is payable on any income arising or accruing to any person whomsoever, from a British<sup>1</sup> source.

An income arises from a British source which is derived from property or possessions in the United Kingdom, from a trade or possession carried on in the United Kingdom, from payments out of the public revenue of the United Kingdom, and the like, or, to put the matter very generally, but, it is conceived, accurately, an income arises from a British source when either it arises from property or possessions in the United Kingdom, or it results (*e.g.*, in the case of a trade) from acts done in the United Kingdom.

This principle holds good as regards income coming under any of the Schedules (D), (C), or (E). Its application, moreover, does not depend on the nationality or domicile, or even the residence, of the person to whom the income is payable or accrues. Whether, indeed, an income is derived from a British source, *e.g.*, whether the trade from which a man makes an annual profit is or is not carried on in the United Kingdom, may to a certain extent depend upon his residence;<sup>2</sup> but when once it is established that an income is derived from a British source, then income tax is payable in respect thereof, whether the person to whom the income accrues be resident in England, France, or Victoria.

*As to Schedule (D).*—Under this schedule the tax is imposed upon annual profits or gains, *i.e.*, income, of the following descriptions.

(i) *Income arising or accruing to any person from property situate in the United Kingdom.*<sup>3</sup>

The income arising from such property is clearly income arising from a British source, and therefore properly taxable within our first principle.

(ii) *Income arising from any profession, trade, employment, or vocation carried on, or exercised within, the United Kingdom.*<sup>4</sup>

<sup>1</sup> For meaning of "British," see p. 748, note 6, *ante*.

<sup>2</sup> *Cesena Sulphur Co. v. Nicholson* (1876), 1 Ex. D. 428; *San Paulo Rail. Co. v. Carter*, [1896] A. C. 31.

<sup>3</sup> Compare Sched. (D), paragraphs 1 and 2, from which it is clear that income derived from property in the United Kingdom is taxable whatever be the residence of the person to whom the income accrues.

<sup>4</sup> Compare carefully Sched. (D), paragraphs 1 and 2. Under paragraph 1, income tax is charged "for and in respect of the annual profits or gains [income] arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains [income] arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere."

Under paragraph 2, income tax is charged "for and in respect of the annual profits or gains [income] arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment or vocation exercised within the United Kingdom."

Hence it follows that—

Income tax is charged in respect of income arising or accruing to any person,

The meaning of this head of charge, as interpreted by the Courts, would be clearer were it expressed as a charge on income arising, not from "any profession, trade, &c., carried on or exercised in the United Kingdom," but from "the carrying on or exercise of any profession, trade, &c., in the United Kingdom." The difference may seem verbal, but is real. The words used in Schedule (D) suggest that if any trade is in part carried on or exercised in the United Kingdom (*e.g.*, if champagne is sold by a French wine merchant in England), the whole profits of the trade are taxable; whereas, if the language of the schedule were altered as suggested, it would be plain that, as is the fact, those profits only of a trade carried on, *e.g.*, by a French wine merchant, in the United Kingdom, are taxable, which result from its being carried on in the United Kingdom. When the meaning of this head of charge is fully understood, it is obvious that the income which accrues to any person, whatever be his nationality or residence, from the carrying on or exercise of a trade within the United Kingdom, is income arising from a British source, and is therefore liable to taxation within our general principle. The true difficulty—and it is a matter which has exercised the ingenuity of the Courts—is to determine whether a profession, trade, &c. is or is not "*carried on or exercised within the United Kingdom.*" For the sake of simplifying the question, let our attention be confined to the case of a "trade" which clearly includes what is now more ordinarily called a business.

What may be the difference (if any) between a trade which is "exercised" and a trade which is "carried on" in the United Kingdom has not been judicially determined, and is not, perhaps, a matter of great importance. It may be laid down with some confidence that, whatever the word "exercised" may mean, it certainly includes "carrying on," and therefore that every trade which is carried on in the United Kingdom is also exercised there.<sup>1</sup>

What is of importance is, that, taking the decisions of the Courts as they now stand, a trade may clearly be carried on or exercised in the United Kingdom in two different cases:—

*First Case.*—A trade or business is "carried on" in the United Kingdom when the ultimate management, or the centre and control of the business, as it is sometimes expressed, is placed in the United Kingdom,<sup>2</sup> or, in other words, when the management of the business

whether residing in the United Kingdom (Sched. (D), paragraph 1) or not residing in the United Kingdom (Sched. (D), paragraph 2), from—

(1) Any *property situate* in the United Kingdom (Sched. (D), paragraphs 1 and 2), and

(2) Any *profession, trade, &c. carried on* (Sched. (D), paragraph 1) or *exercised* (Sched. (D), paragraph 2) in the United Kingdom.

<sup>1</sup> *Eriksen v. Law* (1881), 8 Q. B. D. (C. A.) 414, 415, judgment of Jessel, M. R.

<sup>2</sup> See especially *Cesena Sulphur Co. v. Nicholson* (1876), 1 Ex. D. 429, 452, 454, judgment of Huddleston, B.; *Imperial Continental Gas Association v. Nicholson*

as a whole is placed in the hands of persons who reside, or have their head office, in the United Kingdom.

When this is the case, the whole business is carried on in the United Kingdom; and even though the transactions (*e.g.*, sales) from which profits arise, take place mainly, or wholly, in a foreign country, (by which, of course, is here meant any country not forming part of the United Kingdom), income-tax falls upon the whole of the profits of the business.

*X & Co.*, an English company with their head office in England, undertake in England for the carriage of goods abroad as part of their ordinary business. The whole of the carriage is done abroad. The company, nevertheless, carry on trade in the United Kingdom.<sup>1</sup>

*X & Co.*, a company incorporated under the Companies Acts, 1862—1867, work sulphur mines in Italy, and are afterwards registered in Italy. There is a board of directors in England, and the general business of the company is wholly under the management of this board. The manufacture and sale of sulphur takes place wholly in Italy, and the profits of the company (if any) are made in Italy. The company reside in the United Kingdom. The whole business of the company is carried on in the United Kingdom.<sup>2</sup>

*X & Co.* are incorporated under an English Act. The offices of *X & Co.* are in London, and the meetings of the directors take place there. *X & Co.* make their gains from gas-works in foreign countries, where alone profits (if any) are made. The company reside in the United Kingdom. Their whole business is carried on in the United Kingdom.<sup>3</sup>

*X & Co.*, a company registered under the Joint Stock Companies Acts, carry on business in London as bankers, with branches in foreign countries. The directors and shareholders meet at the head office in London, whence the affairs of *X & Co.* are directed and managed. A large portion of the profits arise from transactions in Mexico. The business is one business, and that business is carried on in the United Kingdom.<sup>4</sup> "They have," says Lord Esher, "only one business, which they carry on in England. It is true that part of the profits of that business carried on in England is earned by means of transactions abroad, but that is not [for income-tax purposes] carrying on the business abroad; it is carrying on the business in England by means of some transactions of it which are carried out abroad."<sup>5</sup>

(1877), 37 L. T. 717; *London Bank of Mexico v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378; *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31.

<sup>1</sup> See *Ericson v. Last* (1881), 3 Q. B. D. (C. A.) 414, 417, illustration suggested in judgment of Jessel, M. R.

<sup>2</sup> *Cesna Sulphur Co. v. Nicholson* (1876), 1 Ex. D. 428. Compare *Calcutta Jute Co. v. Nicholson* (1876), 1 Ex. D. 428.

<sup>3</sup> *Imperial Continental Gas Association v. Nicholson* (1877), 37 L. T. 717.

<sup>4</sup> *London Bank of Mexico v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378.

<sup>5</sup> *Ibid.*, p. 382, judgment of Esher, M. R., and compare p. 384, judgment of Kay, L. J.

X & Co., a company registered under the Companies Acts, whose registered office is in London, are proprietors of a railway in Brazil. The working of the railway is under the control and direction of, and the business of X & Co. is managed by, directors in London, who send out from London the materials and plant necessary for the purpose of the railway. The business is carried on in the United Kingdom.<sup>1</sup>

"It has been repeatedly said during the argument by the counsel for the appellants [*i.e.*, X & Co.] that the question is where the profits are earned, meaning thereby really where they are received. The profits are earned by the whole operation of carrying on the trade; and, moreover, the material question under the words of the statute is, not where the profits are earned, but where the trade is carried on. It was argued that, where the master of a business resident in England determines in this country what steps are to be taken in the conduct of the business, what contracts are to be made and the terms of them, yet, if the contracts are to be carried out abroad, the direction and management of the business in England forms no part of the business by which the profits are earned. But it is obvious that, if the master of such a business makes injudicious contracts, he will not get any profits, whereas, if he makes judicious contracts, he will. It was said that, if the master of a business resident in England buys in this country the materials necessary for carrying on the business, but they are not worked up here, no part of the business by which the profits are earned is carried on in England. These appear to me to be obvious fallacies to which the counsel for [X & Co.] were driven by the stress of the case. The purchase of materials is in most trades a most essential part of the business."<sup>2</sup>

These words of Lord Esher's contain the gist of the whole matter. When the conduct of a business is finally directed and controlled in

<sup>1</sup> *San Paulo Ry. Co. v. Carter*, [1896] A. C. 31.

<sup>2</sup> *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580, 586, 587, judgment of Esher, M.R. See also judgment of Halsbury, C., [1896] A. C., pp. 38, 39; judgment of Lord Davey, *ibid.*, pp. 42, 43; *Grove v. Elliotts* (1896), 3 Tax Cas. 481; *Apthorpe v. Peter Schoenhofen Brewing Co., Ltd.* (1899), 4 Tax Cas. 41; 80 L. T. R. 395. Compare *Goetz & Co. v. Bell*, [1904] 2 K. B. 136.

A foreign corporation may reside in this country for the purposes of income tax. The test of residence is not where it is registered, but where it really keeps house, and does its real business. The real business is carried on where the central management and control actually abides. Whether any particular case falls within that rule is a pure question of fact, to be determined, not according to the construction of this or that regulation, or by law, but upon a scrutiny of the course of business and trading. *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A. C. 455. What should be noted is the close connection between residence in the United Kingdom and the carrying on business there. In the case of a trading corporation, or company, the two things can hardly be separated, for the simple reason that such company has not, in fact, any residence, but resides, from a legal point of view, in the country where the central management and control of its affairs is to be found.

the United Kingdom, it is, whatever be the country wherein the transactions (*e.g.*, the sales) from which profits are earned take place, wholly carried on in the United Kingdom. Hence it follows that the whole of the profits of the business arise from a trade carried on in the United Kingdom, and the whole of them are liable to income tax. It is true that a trade can hardly in this sense be carried on in the United Kingdom unless the person, *e.g.*, the corporation, managing the business, is resident in the United Kingdom. But the liability to income tax does not in this instance really depend on the residence of the person to whom the profits accrue, but on the fact that the whole annual profits arise from a business carried on in the United Kingdom.<sup>1</sup>

In the earlier cases it is apparently assumed by the judges that where a person resided in the United Kingdom he was, *from the mere fact of his residence there*, liable to pay income tax on the whole of the profits accruing to him from a trade carried on in the United Kingdom or elsewhere. This interpretation of the first paragraph of Schedule (D) is now shown to be erroneous by *Colquhoun v. Brooks* (1889), 14 App. Cas. 493. The matter really stands thus: When a trade is carried on in the United Kingdom, the whole of the profits derived from the trade there carried on are liable to income tax, and in many, or in most instances a trade, from which a person who resides in the United Kingdom derives profits, is, from the fact of his residing and managing the business in the United Kingdom, wholly carried on there; but circumstances may occur under which a person who resides in the United Kingdom derives profits from a trade carried on in a foreign country, in which case it does not follow that the whole profits of the trade are taxable. Under the head of charge, in short, which we are considering, though a person's residence may be proof that a trade is carried on in the United Kingdom, it is not his residence in the United Kingdom, but the fact of the trade being carried on there, which imposes liability to income tax.

*Second Case.*—A trade or business is carried on or exercised in the United Kingdom when, or in as far as, the transactions by which profits are earned take place in the United Kingdom.<sup>2</sup>

<sup>1</sup> Contrast *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31, and *London Bank of Mexico v. Apthorpe*, [1891] 2 Q. B. (C. A.) 378, on the one hand, with *Attorney-General v. Alexander* (1874), L. R. 10 Ex. 20, and *Bartholomay Brewing Co. v. Wyatt* and *Nobel Dynamite Co. v. Wyatt*, [1893] 2 Q. B. 499; *Gramophone and Typewriter, Ltd. v. Gramophone Co., Ltd.*, [1908] 2 K. B. (C. A.) 89, on the other.

<sup>2</sup> *Tischler v. Apthorpe* 1885, 52 L. T. N. S. 814; 2 Tax Cas. 89; *Pommery v. Apthorpe* (1886), 56 L. J. Q. B. D. 135; *Werle v. Colquhoun* (1888), 20 Q. B. D. (C. A.) 753. For cases in which trade is exercised in the United Kingdom by a person or company not residing in the United Kingdom, see *Wingate v. Webber* (1897), 3 Tax Cas. 569; *Watson v. Sandie*, [1898] 1 Q. B. 326; *Turner v. Rickman* (1898), 4 Tax Cas. 25; and *conf. Goetz v. Bell*, [1904] 2 K. B. 136; and for cases in which it is not exercised in the United Kingdom by such person, *Grainger v. Gough*, [1896] A. C. 325; *Kodak, Ltd. v. Clark*, [1902] 2 K. B. 450; [1903] 1 K. B. (C. A.) 505.

This holds, even though the ultimate management, or the central point of the trade or business, is placed in a foreign country.

In the decisions having reference to this particular point, the word "exercised" is more often used than "carried on." There is probably, as already pointed out,<sup>1</sup> no substantial distinction between the two terms. The reason why the word "exercised" is generally employed by the judges with regard to a trade, the central seat of which is not in the United Kingdom, is that the cases with reference to such a trade arise where the trader is not resident in the United Kingdom, and therefore fall within the terms of the second paragraph of Schedule (D), which refers to profits accruing to persons not resident in the United Kingdom, and in which the word "exercised" is used instead of "carried on."

X & Y are a French firm of wine-growers and merchants carrying on business at Bordeaux, where they reside. X & Y consign wine to their English customers, and sometimes to N, an agent in England, who receives payment for all the wine sold in England. X & Y have an office in England. X & Y exercise a trade in the United Kingdom.<sup>2</sup>

X & Y, French wine merchants, have a chief office in France, where they reside. They have never been resident in England. They employ an agent in England, who receives orders from customers in England, and collects payments for wines sold there. The wine is supplied either from a stock kept in England, or if the order be large, X & Y ship the wine from France direct to the customer. X & Y exercise the trade of wine merchants in the United Kingdom.<sup>3</sup>

X & Y are a firm of French wine merchants domiciled and resident in France, and employ a London agent to obtain orders for their wine in England. The wine is advertised in England. The name of X & Y is put up at the business premises of their London agent. X & Y keep no wine in England. All orders are forwarded to them in France, and the wine is sent by X & Y thence direct to the English customer at his expense and risk. Payments are made either directly to X & Y or to their London agent. Receipts are sent to the customer by X & Y. The London agent has a commission on the wines sold, but X & Y alone are interested in the gain or loss on the sales. X & Y exercise a trade in the United Kingdom.<sup>4</sup>

X & Y are a foreign telegraph company, domiciled at Copenhagen. They possess marine cables from Denmark, which are in connection with Aberdeen and Newcastle, and which communicate with the telegraph lines of the Post Office in the United Kingdom. They have work-rooms and clerks in London and elsewhere in the United King-

<sup>1</sup> See p. 768, *ante*.

<sup>2</sup> *Tischler v. Apthorpe* (1885), 52 L. T. N. S. 814.

<sup>3</sup> *Pommero v. Apthorpe* (1886), 56 L. J. Q. B. 155.

<sup>4</sup> *Werle v. Colquhoun* (1888), 20 Q. B. D. (C. A.) 753; *Grainger v. Gough*, [1895] 1 Q. B. (C. A.) 71; [1896] A. C. 325.

dom. Messages from the United Kingdom are forwarded by the company to Denmark. The charges for such messages are collected by the Post Office, and after the sums due to the Post Office are deducted, paid to X & Y. X & Y exercise a trade in the United Kingdom.<sup>1</sup>

X, a foreign principal, consigns goods to A, his agent in this country, for sale. A invoices the goods to the English purchaser, in A's own name, and guarantees to X the payment by the purchaser. A remits to X the proceeds of the sale, less A's charge for commission. Trade is exercised by X in the United Kingdom. The reason is that the sale by A in the United Kingdom is, as between A and X, made on behalf of X, who therefore trades in the United Kingdom.<sup>2</sup>

A ship is owned by X & Co., a foreign company registered in Christiania, where is the company's registered office, where the share lists and books of the company are kept, and the shareholders' meetings are held. Two gentlemen resident in Norway are elected as managers, but the chartering of the ship is dealt with by a firm resident in Glasgow, and this firm receives and retains all funds on behalf of the ship until required for payment of expenses or dividends. This firm remit the profits direct to the shareholders. Trade is exercised by the company X & Co. in the United Kingdom.<sup>3</sup>

A is agent in England for X & Co., a foreign company, residing in the United States. A on receipt in England of an offer for the goods of X & Co. communicates the offer to X & Co., and, on receiving the authority of X & Co., accepts it. All goods for delivery in England are put on board ship by the company at Boston, U.S.A., and consigned to Liverpool in the name of A, who distributes the goods to customers. Business is carried on by X & Co. in the United Kingdom.<sup>4</sup>

A trade may then, in two different cases, be carried on or exercised in the United Kingdom, or, to put the same thing in other words, the expression carried on or exercised in Schedule (D) has two different senses. When, however, a trade is so carried on or exercised, the whole of the profits accruing to any person from its carrying on, or exercise, in the United Kingdom are taxable. No doubt the amount of the profits or income taxable in the first case differs from the amount taxable in the second case; for, when a trade comes within the first

<sup>1</sup> *Ericson v. Last* (1881), 8 Q. B. D. (C. A.) 414.

<sup>2</sup> *Watson v. Sandie*, [1898] 1 Q. B. 326.

<sup>3</sup> *Wingate v. Webber* (1897), 3 Tax Cas. 569; 34 Sc. L. R. 699. Note that whilst it was argued for the Crown that X & Co. were resident in Glasgow, it was held by the Court of Session that they were resident in Norway.

<sup>4</sup> *Turner v. Rickman* (1898), 4 Tax Cas. 25. Held by Q. B. D. that the contracts with English customers, as well as the delivery of the goods here, take place in England. *Seem*, that even if the contracts had been made in the United States the delivery of the goods here would have been the exercise of a trade in England. See judgment of Wills, J., p. 34.

case, the whole profits thereof, whether made in the United Kingdom or elsewhere, are liable to income tax, whilst, when a trade comes within the second case, that part only of the profits is liable to income tax which results from transactions taking place in England. But we have, after all, here, not a difference of principle, but an application of one and the same principle to different circumstances. In the first case, a trade is finally managed and controlled in the United Kingdom; hence the whole trade, whatever be the country in which the profits are made, is carried on in the United Kingdom. The whole of the profits result from this carrying on, and therefore are taxable as profits of a trade carried on in the United Kingdom, *i.e.*, as income arising from a British source. In the second case, the trade is finally managed and controlled abroad, though a certain part of it is carried on or exercised in the United Kingdom. The whole of the profits resulting from this part of the trade, *i.e.*, all the profits which result from the trade being carried on or exercised in the United Kingdom, are taxable. And here, again, all the income is taxable which arises from a British source.

This statement of the law rests, be it remembered, on the cases as they at present stand. A point which has never been fully considered by the House of Lords still remains open to doubt. Are the Courts justified in giving, as in effect they do give, two different senses to the one term "carried on" or "exercised"? Are they right in holding, that is to say, that (1) a trade of which all the gains result from transactions in France is wholly exercised or carried on in the United Kingdom because it is ultimately managed by a trader living in London, and (2) that a trade of which part of the profits arise from transactions partially taking place in England is, in part at any rate, a trade exercised in the United Kingdom, even though it is ultimately managed by a French trader living at Paris? It is, at least, arguable that the trade should be held to be carried on or exercised *either* in the country where it is finally managed, *or* in the country where gainful transactions take place, but that it cannot be held to be carried on or exercised in each country. It is, in short, questionable whether a case such as the *San Paulo Ry. Co. v. Carter*<sup>1</sup> is not in principle inconsistent with a case such as *Werle v. Colquhoun*.<sup>2</sup>

(iii) *All interest<sup>3</sup> of money annuities and other annual profits or gains not charged under any other of the schedules.*<sup>4</sup>

Interest is certainly made taxable as such, *i.e.*, as a separate head

<sup>1</sup> [1896] A. C. 31. See also *London Bank of Mexico v. Apthorpe*, [1891] 2 Q. B. (C. A.) 378. I have assumed there is no essential difference between "carrying on" and "exercising" a trade.

<sup>2</sup> (1888), 20 Q. B. D. (C. A.) 753.

<sup>3</sup> Sched. (D), 3rd paragraph.

<sup>4</sup> Compare Income Tax Act, 1842, s. 102 (Dowell, 5th ed. p. 165), and Income Tax Act, 1853, s. 40 (Dowell, p. 290).



of charge. It is difficult from the Income Tax Acts, or the decisions thereon, to infer with certainty what as to "interest" is the exact limit of taxation. But it may safely be concluded that interest, or annual payments of the nature of interest, payable by any person in the United Kingdom to any person in or out of the United Kingdom, are chargeable,<sup>1</sup> *i.e.*, that income from interest is chargeable which arises from a British source.

*As to Schedule (C).*—Under this schedule income tax is imposed on income arising from public annuities, that is, interest or annuities payable to any person out of any public revenue, whether it be the public revenue of the United Kingdom or of any other country, provided that such public annuities are payable in the United Kingdom.<sup>2</sup> Now, whatever be the meaning of "payable in the United Kingdom," a point which will subsequently be considered, it may be assumed that payments out of the public revenue of the United Kingdom, such, *e.g.*, as payments to fund-holders of interest on the British National Debt, are "payable in the United Kingdom," and hence liable to income tax, and such payments constitute income arising from a British source.

*As to Schedule (E).*—Under this schedule are taxed the emoluments of any public office, and pensions, &c. payable by the Crown, or out of the public revenue of the United Kingdom. As the public offices, &c. referred to are pretty clearly public offices in the United Kingdom, and the pensions, &c. are paid in substance out of the revenue of the United Kingdom,<sup>3</sup> we have here again income which is taxed as arising from a British source.

*Second Principle.*—Income tax is payable on income from any foreign source arising or accruing to any person residing in the United Kingdom.<sup>4</sup>

*But the tax payable in respect of such income is to be computed only on the full amount of the actual sums annually received in the United Kingdom.*<sup>5</sup>

<sup>1</sup> See Income Tax Act, 1842, s. 102. Compare *Alexandria Water Co. v. Musgrave* (1833), 11 Q. B. D. (C. A.) 174. From the later cases, *e.g.*, *London Bank of Mexico v. Apthorne*, [1891] 2 Q. B. (C. A.) 378; *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31, it may be inferred that the Alexandria Water Company, which admittedly resided in Egypt and managed its business there, and therefore carried on the whole business in the United Kingdom. It therefore is a case of a charge in respect of interest paid to persons out of the United Kingdom, by a person living in the United Kingdom, from a British source.

<sup>2</sup> Compare Income Tax Act, 1853, s. 2, Sched. (C), and s. 5, with Income Tax Act, 1842, s. 88.

<sup>3</sup> See Income Tax Act, 1853, ss. 2, 5, and compare Income Tax Act, 1842, s. 146, which contains rules for charging duty under Sched. (E), and especially 3rd Rule.

<sup>4</sup> See Sched. (D), 1st paragraph, and Sched. (C), taken together with Income Tax Act, 1842, s. 88.

<sup>5</sup> See Sched. (D), 1st paragraph (Dowdell, 5th. ed. p. 262), and Income Tax Act, 1842, s. 100, Fourth Case and Fifth Case (Dowdell, pp. 157—163). Compare, especially, *Colquhoun v. Brooks* (1849), 14 App. Cas. 493, and *Bartholomay Brewing Co. v. Wyatt*; *Nobel Dynamite Co. v. Wyatt*, [1893] 2 Q. B. 499.

<sup>6</sup> See Sched. (C) (Dowdell, p. 261), and Income Tax Act, 1842, s. 88 (Dowdell,

As to the principle itself, three points are to be noticed:—

(1) *Foreign source*.—Our second principle applies to incomes arising from a foreign source. It does not apply to incomes arising from a British source; these come within and are governed by our first principle. Our second principle, be it noted, is stated in an affirmative form, and does not positively exclude the taxability of incomes from a foreign source, which may not come precisely within its terms.<sup>1</sup> An income arising from a foreign source must, speaking generally, arise from foreign securities, under which word may perhaps be included the public revenues of foreign states,<sup>2</sup> or from property or possessions in a foreign country, under which term are to be included profits made in a foreign country by a trade or business, in so far as it is carried on there. The point of difficulty is to determine whether a trade or business is carried on in a foreign country or not; all that can be laid down is, that a trade, &c. is carried on in a foreign country, or, in other words, not in the United Kingdom, in so far as it does not come within either of the cases in which a trade is carried on or exercised in the United Kingdom.<sup>3</sup>

(2) *Person residing in the United Kingdom*.—This term, which is taken from Schedule (D), is nowhere defined in the Income Tax Acts. “Residing,” however, does not mean “domiciled.”<sup>4</sup> What little light is to be gained as to the meaning under the Income Tax Acts of “residence” in the United Kingdom, or of “residing in” the United Kingdom, must be drawn from the Income Tax Act, 1842, s. 39. This enactment refers only to Schedule (D), and the part of it which is, for our present purpose, material, runs, as amended by the Income Tax Act, 1853, as follows:—

“No person who shall . . . actually be in [the United Kingdom] “for some temporary purpose only, and not with any view or intent “of establishing his residence therein, and who shall not actually have “resided in [the United Kingdom] at one time or several times for a “period equal in the whole to six months in any one year, shall be “charged with the . . . duties mentioned in Schedule (D) as a person “residing in [the United Kingdom], in respect of the profits or gains “received from or out of any possessions in any . . . of her Majesty’s “dominions, or any foreign possessions, or from securities in . . . any “ . . . of her Majesty’s dominions, or foreign securities; but, never- “theless, every such person shall, after such residence in [the United

p. 120). This proviso, it is believed, gives in substance the effect of the Income Tax Act, 1842, s. 100, Fourth Case and Fifth Case; but the words of the enactment (which are obscure) must be carefully read in connection with the decisions thereon.

<sup>1</sup> See Third Principle, *post*.

<sup>2</sup> Sched. (C).

<sup>3</sup> See pp. 767—774, *ante*. Of course the remarks applicable to a trade apply also to a profession, employment, or vocation. See Sched. (D).

<sup>4</sup> *Attorney-General v. Coote* (1817), 4 Price, 183; 18 R. R. 692.

“ Kingdom] for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the sixth day of April “ preceding.”<sup>1</sup>

These words are ambiguous. They may mean that no one is to be treated as a person residing within the United Kingdom so as to be chargeable as such, under Schedule (D), who *both* is in the United Kingdom for a temporary purpose only, *and* has not actually resided there for six months, and this is, perhaps, grammatically and legally, the right interpretation of the enactment; the result, however, would follow that a man who is in the United Kingdom with the fixed purpose of settling there, but has actually resided there only for a week, and also a man who is in the United Kingdom for a temporary purpose only, *e.g.*, the prosecution of a lawsuit, but has resided there for seven months in one year, are each chargeable with income tax under Schedule (D) as a person residing in the United Kingdom. The enactment may, on the other hand, mean that no man is chargeable with income tax as a person residing in the United Kingdom who *either* is in the United Kingdom for a temporary purpose only, *or* who, though in the United Kingdom with a view to establishing his residence there, has not resided there for six months in any one year. From this interpretation the result, however, would follow that a man who is in the United Kingdom with the fixed purpose of establishing his residence there, but who has not resided in the United Kingdom for the whole of six months in one year, and a man who is in the United Kingdom for a temporary purpose only, *e.g.*, the prosecution of a lawsuit, but has resided there for, say, two years, are neither of them chargeable with income tax under Schedule (D) as a person residing in the United Kingdom. The residence of a corporation is apparently the country where it has its head office, or perhaps better, the country where it has the centre of its business.<sup>2</sup>

(3, *Amount*.—The amount on which income tax is chargeable under the second principle is not the amount of the profits or income accruing from property or possessions abroad to a person resident in the United Kingdom, but the part of such profits or income which is annually or during the year received in the United Kingdom. The ground, in short, of the second principle seems to be that a person who resides in the United Kingdom, and is therefore, to a certain extent, permanently protected by its laws, is properly taxable as regards property which is received as income in the United Kingdom. There may occasionally be difficulties in determining how far profits or income are in fact received in the United Kingdom.<sup>3</sup> Whether it is so received is in each case to be determined as a matter of fact.

<sup>1</sup> Income Tax Act, 1842, s. 39 (part); Dowell, p. 40.

<sup>2</sup> See “Domicil of Corporations,” Rule 19, p. 160, *ante*.

<sup>3</sup> *Scottish Mortgage Co. of New Mexico v. McKelvie* (1886), 24 Sc. L. R. 87.

*As to Schedule (D).*—Our second principle applies to every kind of income from a foreign source which comes within Schedule (D). The language, it is true, of Schedule (D), and especially of paragraph 3, as to interest, is not clear, but the general effect of the schedule, combined with the rules contained in the Income Tax Act, 1842, s. 100, apparently is that all annual profits or gains coming within Schedule (D) which accrue to a person resident in the United Kingdom are chargeable with income tax up to the amount of the actual sums annually received in the United Kingdom. This clearly is so as regards interest from securities in foreign countries,<sup>1</sup> and also as regards profits from foreign possessions,<sup>2</sup> which term is of the very widest description, and covers everything which a man can possess in a foreign country;<sup>3</sup> it certainly includes profits derived from a trade carried on wholly abroad.<sup>3</sup>

*As to Schedule (C).*—Our second principle seems at first sight hardly applicable to an income under Schedule (C); neither the schedule itself nor the rules for assessing duties under it provide that the income chargeable must accrue to a person who resides in the United Kingdom, or that the tax shall be charged only on the amount actually received in the United Kingdom. Yet it will be found that the second principle is, in substance, applicable to public annuities, paid out of the public revenue of a foreign country, *e.g.*, France. Such public annuities are chargeable with income tax if “payable in the United Kingdom out of any “public revenue in the United Kingdom or elsewhere,” *e.g.*, in France. Now the term “annuities payable in the United Kingdom,” though the expression is rather vague,<sup>4</sup> apparently means annuities of which a person can obtain payment in the United Kingdom, or the payment of which in the United Kingdom is provided for by the state, *e.g.*, France, paying the annuities, or is intrusted to agents in the United Kingdom of such government.<sup>5</sup> But the moneys provided for payment in the United Kingdom, *e.g.*, of interest due to holders in the United Kingdom of French funds, are in effect received in the United Kingdom. It is, therefore, the amount received in the United Kingdom which in substance is taxed. Again, though nothing is said about the necessity of the person to whom the public annuities are due being resident in the United Kingdom, and the tax is, in the first instance, levied upon the agent in the United Kingdom intrusted with payment thereof,<sup>5</sup> yet in the vast majority of instances the payments made, or, in other words, the annuities payable to holders in the United

<sup>1</sup> Income Tax Act, 1842, s. 100, Fourth Case; *Gresham Life Assurance Society v. Bishop*, [1902] A. C. 287.

<sup>2</sup> Income Tax Act, 1842, s. 100, Fifth Case.

<sup>3</sup> *Colquhoun v. Brooks* (1889), 14 App. Cas. 493.

<sup>4</sup> Compare, for similar words, the Stamp Act, 1891 (54 & 55 Vict. c. 39) s. 82 (b) (iii).

<sup>5</sup> Compare 5 & 6 Vict. c. 80.

Kingdom, *e.g.*, of French funds, are payments to persons resident in the United Kingdom. Our second principle, moreover, as already pointed out,<sup>1</sup> is simply affirmative, and it is certainly true that moneys received or held in the United Kingdom for payment of interest due to French fund-holders resident in the United Kingdom are chargeable with income tax. And such moneys clearly constitute an income which, while within Schedule (C), is chargeable under our second principle.<sup>2</sup>

*Third Principle.*—*Income tax is not in general payable in respect of any income which is not chargeable therewith under one of the two preceding principles.*

This third principle certainly holds good generally, if not invariably. Its application may be seen from the following illustrations:—

1. X, residing in England, is a sleeping partner in a business wholly carried on by Y & Z in Australia. X's share in the profits, or, in other words, income from the business, is not remitted to the United Kingdom, but is by his instructions every year invested in the purchase of land in Australia. Income tax is not payable thereon.<sup>3</sup>

2. A company is formed in England for the purpose of bringing under a single control all the Kodak Companies throughout the whole world. To do this the company acquires 98 per cent. of the shares of the American Kodak Company, and retains the services of the founder and manager of the American company. The remaining shareholders of the American company are independent of the English company. The English company, by power of attorney, appoints the American manager with two other American gentlemen its proxies to vote at the meetings of the American company. The two companies buy and sell goods to each other in the ordinary way. The control exercised by the English company is the control of the shareholders only. Hence the business of the American company is not the business of and carried on by the English company in England. The English company is therefore not assessable upon the full amount of the profits of the American company.<sup>4</sup>

3. X is an American staying in England for a month or two for the transaction of business, but with no intention of residing there. A large part of his income from investments in America is remitted to him in England. Income tax is not payable thereon.<sup>5</sup>

4. X is an Englishman resident in England. He owns shares in

<sup>1</sup> See p. 776, *ante*.

<sup>2</sup> As to Schedule (E) nothing need be here said, as all incomes taxable under that schedule must apparently arise from a British source.

<sup>3</sup> *Colquhoun v. Brooks* (1889), 14 App. Cas. 493.

<sup>4</sup> *Kodak, Ltd. v. Clark*, [1902] 2 K. B. 450; [1903] 1 K. B. (C. A.) 505. See *Bartholomay Brewing Co. v. Wyatt*, [1892] 2 Q. B. 499, which perhaps may be upheld on the same ground as *Kodak, Ltd. v. Clark*. But contrast *De Beers Consolidated Mines v. Howe*, [1906] A. C. 455.

<sup>5</sup> See p. 776, *ante*.

French railways. The interest on the shares, amounting to 1,000*l.* a year, is received by himself every year at Paris, and there spent or invested in French investments. Income tax is not (*seem*) payable in respect thereof.<sup>1</sup>

5. The circumstances are the same as in Illustration 4, except that X, after receiving his 1,000*l.* of interest, brings the whole of it to England. Income tax is not (*seem*) payable in respect of the 1,000*l.* For, whatever X does with the money after he has received it, it is received by X, not in the United Kingdom, but in France.

6. The circumstances are the same as in Illustration 5, except that the 1,000*l.* is received by X's banker for X at Paris, and then is remitted by the banker to X in England. *Seem*, that, logically, no income tax ought to be payable in respect of the 1,000*l.* The receipt of the banker is the receipt of X, and the receipt by X, therefore, takes place, not in the United Kingdom, but in France. Whether, however, the money may not be chargeable with income tax? The Courts very possibly may hold that the whole transaction is to be treated only as an indirect way of remitting the 1,000*l.* to X in England.

7. The circumstances are the same as in Illustration 6, except that X's banker, after having received the 1,000*l.*, spends it by X's direction in purchasing 1,000*l.* worth of wine in Paris, and sends the wine to X in England. Income tax is not payable in respect of the 1,000*l.*, for no "sums" of money are received in the United Kingdom.

8. X, who resides in England, holds bonds, on which interest is payable by a foreign government. The interest is not payable in the United Kingdom, *i.e.*, it is payable only to X or his agents in the foreign country by the government of which the bonds are issued. The interest is not liable to income tax under Schedule (C), but if remitted to X, or to X's agent, in the United Kingdom, is liable to income tax under Schedule (D).

#### NOTE 9.

#### ACQUISITION, LOSS, AND RESUMPTION OF BRITISH NATIONALITY.

The statement of the law as to British Nationality in Chapter III.<sup>2</sup> is rendered complex by the necessity for following the terms, and to a great extent the arrangement, of the Naturalization Act, 1870, as well as for mentioning some exceptions which are of no practical

<sup>1</sup> *Gresham Life Assurance Society v. Bishop*, [1902] A. C. 287, 293, judgment of Halsbury, C. Conf. *Colquhoun v. Brooks* (1889), 14 App. Cas. 493.

<sup>2</sup> See p. 164, *ante*.

importance. This Note is intended to summarise in broad terms, omitting minor exceptions, the general rules as to the acquisition, &c. of British nationality.

### I. ACQUISITION OF BRITISH NATIONALITY.

British nationality can be acquired in the following five modes :—

- (A) By *place of birth*.
- (B) By *descent*, without reference to place of birth.
- (C) By the *combined* effect of *descent* and of *place of residence* during infancy.
- (D) By *marriage*, in the case of a woman.
- (E) By *naturalization* under the *Naturalization Act*, 1870, in case of a man, or unmarried woman of full age.

(A) *By place of birth*.—Any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject.<sup>1</sup>

This principle is not affected by the Naturalization Act, 1870. The son of French citizens, born in London or Calcutta, is from the moment of his birth a British subject. The only respect in which his position, in regard to nationality, differs from that of a son of English parents who is born in London is that he can, when he has attained full age, renounce British nationality, and, by making a declaration of alienage, become thereupon in the eye of English law an alien.<sup>2</sup> In other words, the son of aliens, if born in the British dominions, is as much a natural-born British subject as would be the son of British subjects born within the British dominions. The difference caused by descent from parents who are aliens has reference, not to the *acquisition* but to the mode of *changing* British nationality.

The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality<sup>3</sup> are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the king of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown.<sup>4</sup>

(B) *By descent*.—In two cases a person acquires British nationality

<sup>1</sup> See Rule 22, p. 166, *ante*.

<sup>2</sup> See Naturalization Act, 1870 (33 Vict. c. 14), s. 4, and Rule 28, p. 177, *ante*.

<sup>3</sup> See pp. 167, 168, *ante*.

<sup>4</sup> See generally, *Calvin's Case* (1608), 7 Rep. 1, 18 a, 18 b, and compare *De Geer v. Stone* (1882), 22 Ch. D. 243.

at birth by virtue of descent alone, without reference to the place where he is born :—

*First.* A child whose father was born within the British dominions is, though born outside the British dominions, himself a natural-born British subject.<sup>1</sup>

*Secondly.* A child whose father's father (paternal grandfather) was born within the British dominions is a natural-born British subject, even though the child's father and the child himself were not born within the British dominions.<sup>1</sup>

Three points require notice :—

The acquisition, in the first place, of nationality by descent, is foreign to the principles of the common law, and is based wholly upon statutory enactments. The statutes, in the second place, which give the privilege, contain certain unimportant limitations or exceptions<sup>2</sup> with which it is not worth while encumbering this Note. The mode, in the last place, in which these enactments have been construed by the law Courts has led to the result that a child neither whose father nor whose paternal grandfather was born within the British dominions is not himself a natural-born British subject. To put the same thing in another shape, British nationality does not pass by descent or inheritance beyond the second generation. This is noticeable because the words of the statutes 7 Anne, c. 5, s. 3, and 4 Geo. II. c. 21, s. 1, might be, but are not, read as enacting that the descendants through males of a natural-born British subject should themselves be in all cases natural-born British subjects.<sup>3</sup>

(C) *By the combined effect of descent and of place of residence during infancy.*<sup>4</sup>—The child of a naturalized British subject is not himself, in virtue of his descent, a natural-born British subject. Where, however, a father, or a mother (being a widow), obtains a certificate of naturalization in the United Kingdom, every child of such father or mother who, during infancy, becomes resident with such father or mother in the United Kingdom, is himself a naturalized British subject. It makes, apparently, no difference whether the child be born after or before the parent's naturalization. The two conditions requisite are, first, the naturalization of the parent, and, secondly, residence by the child during a portion of his infancy with the parent who has obtained naturalization in some part of the United Kingdom. Substantially the same principle applies in cases in which the father, or mother (being a widow), obtains a certificate of re-admission to British nationality<sup>5</sup> under the Naturalization Act. The difference in this

<sup>1</sup> See 4 Geo. II. c. 21, s. 1, 13 Geo. III. c. 21, and Rule 23, p. 168, *ante*.

<sup>2</sup> Compare p. 171, *ante*.

<sup>3</sup> Note particularly the proviso to Rule 23, p. 169, *ante*, and comment thereon.

<sup>4</sup> See Naturalization Act, 1870, s. 10, sub-s. (5), taken together with 58 & 59 Vict. c. 43, s. 1, sub-s. (2), and Rule 34, p. 182, *ante*.

<sup>5</sup> See Naturalization Act, 1870, s. 10, sub-s. (4), and Rule 36, p. 187, *ante*.



case is, that the residence which makes the child a British subject is residence, not necessarily in the United Kingdom, but in any part of the British dominions.<sup>1</sup>

(D) *By marriage*.—Marriage in no case affects the nationality of a man. With a woman it is otherwise.

The principle of English law laid down by the Naturalization Act, 1870, s. 10, is that “a married woman shall be deemed to be a subject “ of the state of which her husband is for the time being a subject.”

The result of this principle is that a woman who is an alien acquires British nationality by marriage with a British subject.

Whether she retains British nationality, when on the death of her husband she becomes a widow, may perhaps be doubtful, and a similar question arises in case of her marriage being dissolved by a divorce. On the whole, the right answer to this inquiry probably is, that a woman who has by marriage become a British subject remains a British subject on the dissolution of her marriage. But the correctness of this reply must, until the matter is dealt with judicially, remain doubtful.

(E) *By naturalization under the Naturalization Act, 1870*.—An alien, if under no disability, *i.e.*, if neither an infant, a lunatic, an idiot, nor a married woman, can become a naturalized British subject by compliance with the conditions prescribed by the Naturalization Act, 1870.<sup>2</sup>

## II. LOSS OF BRITISH NATIONALITY (EXPATRIATION).

At common law a change of British allegiance or expatriation was impossible; a British subject might, indeed, become the subject of another state according to the law of that state. But the British Government and the British Courts did not, till the passing of the Naturalization Act, 1870, recognise such change of allegiance. A British subject, for example, who became a naturalized American citizen, though treated in the United States as an American citizen, was before 1870 held by British law to be still a British subject, and was liable to all the obligations of a British subject. Hence loss of British nationality or expatriation depends wholly upon Act of Parliament, *i.e.*, on the provisions of the Naturalization Act, 1870, as amended by subsequent enactments.

British nationality can be lost in the following four modes:—

(A) By naturalization in a foreign state.<sup>3</sup>

(B) By a declaration of alienage.<sup>4</sup>

<sup>1</sup> *Ibid.* Compare p. 786, *post*.

<sup>2</sup> See Naturalization Act, 1870, s. 7, and Rule 25, p. 172, *ante*, and compare as to disability, Rule 20, clause 6, p. 165, *ante*.

<sup>3</sup> Naturalization Act, 1870, s. 6; Rule 26, p. 176, *ante*.

<sup>4</sup> Naturalization Act, 1870, s. 4; Rule 28, p. 177, *ante*.

(C) By the combined effect of descent and place of residence during infancy.<sup>1</sup>

(D) By marriage, in the case of a woman.<sup>2</sup>

(A) *By naturalization in a foreign state.*—A man or a woman who is not under any disability<sup>3</sup> ceases to be a British subject, *i.e.*, becomes an alien, if, when in a foreign state, he or she becomes naturalized in such state.<sup>4</sup>

*First.* No one can thus cease to be a British subject who is either an infant, a lunatic, an idiot, or a married woman.<sup>5</sup> The term “infant” means an infant according to English law. Hence an Englishman of 19 dwelling in a country where the age of majority is fixed at 18 could not (it is conceived) expatriate himself, in the eye of English law, by becoming naturalized in such country, even though the laws thereof should allow naturalization to any man over the age of 18.

*Secondly.* A British subject cannot, according to English law, cease to be a British subject, by becoming naturalized in a foreign state, unless he is in that state. Hence, to take an example suggested by history, the vote of a French Assembly naturalizing a British subject resident in England would not, according to English law, turn him into an alien, even though he were willing to accept French citizenship.

(B) *By declaration of alienage.*<sup>6</sup>—Any person who is a natural-born British subject by reason of his having been born within the British dominions, *e.g.*, in London, and who is also at the time of his birth the subject of another state, *e.g.*, Italy, under the laws of that state (*e.g.*, Italian law) can, if under no disability,<sup>7</sup> make a declaration of alienage and thereupon cease to be a British subject.<sup>8</sup> So also, subject to the same conditions as to absence of any disability, can any person who is born out of the British dominions of a father who is a British subject.<sup>9</sup>

The right to put off British nationality by a mere declaration of alienage is given in order to meet the case of persons who, though really foreigners, are under English law natural-born British subjects.<sup>10</sup> The exercise of this right is subject to the following conditions:—

- (1) It can be exercised only by a natural-born British subject.
- (2) It cannot apparently be exercised by any one who is an infant

<sup>1</sup> Naturalization Act, 1870, s. 10, sub-s. (3); Rule 35, p. 185, *ante*.

<sup>2</sup> Naturalization Act, 1870, s. 10; Rule 31, p. 180, *ante*.

<sup>3</sup> As to disability, see p. 165, *ante*.

<sup>4</sup> See Naturalization Act, 1870, s. 6 (1st para.), and Rule 26, p. 176, *ante*.

<sup>5</sup> *I.e.*, is under a disability.

<sup>6</sup> Reference is purposely omitted to the exceptional case, in which, under a convention with a foreign state, aliens who have been naturalized as British subjects may divest themselves of British nationality. See Naturalization Act, 1870, s. 3, and Rule 27, p. 177, *ante*.

<sup>7</sup> See p. 165, *ante*.

<sup>8</sup> Naturalization Act, 1870, s. 4, and Rule 28, p. 177, *ante*.

<sup>9</sup> Naturalization Act, 1870, s. 4, and Rule 29, p. 178, *ante*.

<sup>10</sup> See Rules 22 and 23, pp. 166—169, *ante*.

according to English law, any more than by a lunatic, an idiot, or a married woman.

(3) The right may apparently be exercised at any time after the person exercising it has attained full age, *i.e.*, the age of 21.

(C) *By the combined effect of descent and place of residence during infancy.*<sup>1</sup>—When a child's father is a British subject, or a child's mother is a British subject and a widow, and such father or mother respectively become, under the Naturalization Act, 1870, an alien and naturalized in a foreign country, *e.g.*, Russia, then the child of such father or mother, if he, during infancy, has become resident in Russia, and has according to Russian law become naturalized in Russia, becomes a Russian subject and ceases to be a British subject. What is to be particularly noted is, that the *mere* fact of change of nationality on the part of a child's parents does not suffice to deprive him of the character of a British subject.

(D) *By marriage in the case of a woman.*<sup>2</sup>—A woman who is a British subject, on marriage with an alien ceases to be a British subject, and becomes a subject of the state of which her husband is, for the time being, a subject.

### III. RESUMPTION OF BRITISH NATIONALITY.

British nationality can be resumed in the following three modes :—

(A) By re-admission to British nationality under the Naturalization Act, 1870, in the case of a man or an unmarried woman of full age.

(B) By marriage in the case of a woman.

(C) By the combined effect of descent and place of residence during infancy.

(A) *By re-admission.*<sup>3</sup>—A natural-born British subject may resume British nationality on obtaining a certificate of re-admission to British nationality. Such a certificate is given on substantially<sup>4</sup> the same terms, and subject to the same conditions, as a certificate of naturalization. It can therefore, apparently, be obtained only by an adult, and (in the case of a woman) only by an unmarried woman, including in that term a widow.

(B) *By marriage.*<sup>5</sup>—A woman who by marriage with an alien has become an alien resumes British nationality either on her husband

<sup>1</sup> See the Naturalization Act, 1870, s. 10, sub-s. (3), and Rule 35, p. 185, *ante*.

<sup>2</sup> See Naturalization Act, 1870, s. 10, sub-s. (1), and Rule 31, p. 180, *ante*.

<sup>3</sup> See Naturalization Act, 1870, s. 8, and Rule 30, pp. 178, 179, *ante*.

<sup>4</sup> Note the Naturalization Act, 1870, s. 8 (Rule 30, pp. 178, 179, *ante*), para. 3, as to residence within a British possession, and compare sect. 7 (Rule 25, p. 172, *ante*).

<sup>5</sup> See Naturalization Act, 1870, s. 10, and Rule 31, p. 180, *ante*.

a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.

## NOTE 11.

LIST OF ADMIRALTY CLAIMS.<sup>1</sup>

(i) *Any claim as to (1) the possession, (2) the ownership, (3) the earnings or employment, of any ship registered at any port in England.*<sup>2</sup>

This head includes three different kinds of claims, viz., a claim to the possession of a ship (e.g., where a ship is wrongfully detained by the master and an action is brought to dispossess him<sup>3</sup>); a claim involving a dispute as to ownership<sup>4</sup> and claims by an owner or owners against the co-owners of a ship, under which class comes the proceeding called "an action of restraint," whereby the minority in interest of the owners of a British ship obtain security from the majority when about to send the ship on a voyage against the will of the minority.<sup>5</sup>

(ii) *Any claim to the ownership, possession, or employment of any foreign ship which the representative of the state<sup>6</sup> to which the ship belongs consents, or which the parties to the action consent, to have tried.*<sup>7</sup>

"It is with the greatest reluctance that the Court adjudicates in suits of possession where foreigners alone are concerned; when it does proceed in such cases, it is only in order to prevent further inconvenience and loss by resort to the decisions of other Courts in other countries. Where the consent of the representative of the foreign state to which the vessel belongs is withheld, such a suit is seldom or never entertained unless it has been referred to the Court

<sup>1</sup> *I.e.*, claims in respect of which an Admiralty action is maintainable. See Williams & Bruce, *Adm. Prac.*, 3rd ed., chaps. i. to ix. inclusive. It may be well to observe that in this Note "British" means (1) as applied to a ship, a ship owned by British subjects within the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1; and (2) as applied to waters, territorial waters of the British dominions (see Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73)), and "foreign" means "not British."

<sup>2</sup> See Williams & Bruce, *Pt. I.*, chap. i., pp. 27—36; Admiralty Court Act, 1861 (24 Vict. c. 10), s. 8; 3 & 4 Vict. c. 65, s. 4. "England" in these claims includes Wales. See p. 71, *ante*.

<sup>3</sup> *W. & B.*, p. 29; *The New Draper* (1802), 4 Rob. 287; *The See Renter* (1811), 1 Dod. 22; *The Kent* (1862), Lush. 495.

<sup>4</sup> *W. & B.*, pp. 27, 28; *The Empress* (1856), Swab. 160; *The Glasgow* (1856), Swab. 145.

<sup>5</sup> *W. & B.*, p. 32; *The Talea* (1880), 5 P. D. 169.

<sup>6</sup> *I.e.*, in practice the consul.

<sup>7</sup> *W. & B.*, p. 29. They do not make a separate head of jurisdiction in respect to foreign owners, but group together all claims having reference to possession, restraint, and ownership.

“ by the agreement of the parties. In a suit between foreigners, where  
 “ the main question in the cause depends upon the municipal law of  
 “ foreign states, and not upon any principle of the maritime law as  
 “ administered in this country, the Court will decline to decree pos-  
 “ session, for it will not be instrumental in depriving foreigners of  
 “ rights to which they may be entitled by the law of their own coun-  
 “ try. But the Court will entertain a suit instituted by a British  
 “ subject to recover possession of a ship which has come to this country  
 “ in the possession of foreigners.”<sup>1</sup>

It is doubtful whether the Court has jurisdiction to entertain an action of restraint in the case of a foreign ship.<sup>2</sup>

(iii) *Any claim in respect of any mortgage*<sup>3</sup> where either (a) the ship is, or the proceeds thereof are, under arrest,<sup>4</sup> or (b) the mortgage has been duly registered under the *Merchant Shipping Act*, 1894.<sup>5</sup>

The Court of Admiralty had no original jurisdiction *in rem* over mortgages. It acquired, however, by statute, jurisdiction (which has passed to the High Court) in two cases: (1) Where the mortgage is unregistered, but the ship mortgaged is under the arrest of the Court, or (2) the proceeds thereof have been brought into the registry.<sup>6</sup>

The arrest, it should be noted, must be not only an actual arrest, but a rightful arrest, that is, it must be an arrest in a suit which the Court has jurisdiction to entertain.<sup>7</sup>

(iv) *Any claim to enforce a bottomry*<sup>8</sup> bond.

“ Bottomry is a contract by which, in consideration of money  
 “ advanced for the necessities of a ship to enable it to proceed on a  
 “ voyage, the keel or bottom of the ship, *pars pro toto*, is made liable  
 “ for the repayment of the money in the event of the safe arrival of  
 “ the ship at its destination. Not only the ship, but the freight and  
 “ cargo, may be the joint or single subject of hypothecation. When  
 “ the cargo alone is hypothecated, the term *respondentia* is applied to  
 “ the contract. Respondentia bonds rest on the same general prin-  
 “ ciples as bottomry bonds on the ship,”<sup>9</sup> and for the present purpose  
 may be included under bottomry. The Court, as representing the

<sup>1</sup> W. & B., pp. 29, 30.

<sup>2</sup> See W. & B., p. 32, note (l), and *The Graff Arthur Bernstorff* (1854), 2 Spinks, Ec. & Ad. 30.

<sup>3</sup> W. & B., Pt. I., chap. ii., pp. 37—46.

<sup>4</sup> 3 & 4 Vict. c. 65, s. 3; W. & B., pp. 43, 44; *The Evangelistria* (1876), 2 P. D. 241, n.

<sup>5</sup> Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 11; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 31—38, taken with Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. (1); W. & B., pp. 44—46.

<sup>6</sup> 3 & 4 Vict. c. 65, s. 3.

<sup>7</sup> W. & B., p. 44, note (d); *The Evangelistria* (1876), 2 P. D. 241, n.; *Taylor v. Carryl* (1857), 20 Howard, 583, 599 (U. S.).

<sup>8</sup> W. & B., Pt. I., chap. iii., pp. 47—72.

<sup>9</sup> W. & B., p. 47.

Court of Admiralty, has original jurisdiction to entertain an action *in rem* for any claim on a bottomry bond or on a respondentia bond.

(v) *Any claim for damage done or received by any British or foreign<sup>1</sup> ship, whether on the high seas or not.<sup>2</sup>*

“The Court of Admiralty always exercised undisputed jurisdiction over torts committed by its own subjects on the high seas, but the ancient statutes expressly prohibited it entertaining any cause of action arising within the body of a country. So far, however, as related to the jurisdiction of the Court in cases of damage, this prohibition was almost entirely done away with prior to the transfer of the jurisdiction of the Admiralty Court to the High Court of Justice.”<sup>3</sup> Since the Admiralty Court Act, 1861, the Court of Admiralty has entertained suits for collision between British ships in foreign inland waters; and the Court of Admiralty, and the High Court as representing it, has also entertained suits for collisions between foreign ships in foreign waters, and between an English and a foreign ship in foreign waters.<sup>4</sup>

The term “damage” in this claim includes personal injury.<sup>5</sup> But the Court of Admiralty never possessed, and the High Court therefore has not jurisdiction to entertain, an action *in rem* for loss of life, under Lord Campbell’s Act<sup>6</sup> or otherwise.

(vi) *Any claim<sup>7</sup> by the owner, consignee, or assignee, of a bill of lading carried, or to be carried,<sup>8</sup> by any British or foreign ship<sup>9</sup> into any port in England, for (1) damage done to goods by the negligence or misconduct of the owner, master, or crew, or (2) any breach of duty or breach of contract, in relation to the goods and connected with damage to them,<sup>10</sup> on the part of the master, owner, or crew.<sup>11</sup>*

<sup>1</sup> See *The Mecca*, [1895] P. (C. A.) 25, 108, judgment of Lindley, L. J.

<sup>2</sup> W. & B., Pt. I., chap. iv., pp. 73—121; 3 & 4 Vict. c. 65, s. 6; Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 7; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 688, taken with Interpretation Act, 1889, s. 38, sub-s. (1); *The Clara Killam* (1870), L. R. 3 A. & E. 161; *The Malvini* (1863), Br. & L. 57; *The Griefswald* (1859), Sw. 430; *The Sylph* (1867), L. R. 2 A. & E. 24; *The Diana* (1862), Lush. 539; *The Courier* (1862), Lush. 541; *The Vera Cruz* (1884), 10 App. Cas. 59; *The Robert Pow* (1863), Br. & L. 99. See *The Theta*, [1894] P. 280, as to meaning of damage done “by” a ship.

<sup>3</sup> W. & B., p. 73.

<sup>4</sup> *Ibid.*, p. 77; *The Courier* (1862), Lush. 541; *The Diana* (1862), Lush. 539; *The Halley* (1868), L. R. 2 P. C. 193.

<sup>5</sup> *The Sylph* (1867), L. R. 2 A. & E. 24.

<sup>6</sup> *The Vera Cruz* (1884), 10 App. Cas. 59.

<sup>7</sup> W. & B., Pt. I., chap. v., pp. 122—126.

<sup>8</sup> *The Danzig* (1863), Br. & L. 102.

<sup>9</sup> See *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

<sup>10</sup> W. & B., p. 124.

<sup>11</sup> 24 Vict. c. 10, s. 6; *The Bahia* (1863), Br. & L. 61; *The Patria* (1871), L. R. 3 A. & E. 436; *The Pieve Superiore* (1874), L. R. 5 P. C. 482; *The Norway* (1864), Br. & L. 226; *The Dannebrog* (1874), L. R. 4 A. & E. 386; *The Kasan* (1863), Br. & L. 1; *The Tigris* (1863), Br. & L. 38; *The St. Cloud* (1863), Br. & L. 4; *The Princess Royal* (1870), L. R. 3 A. & E. 41.

This claim is not maintainable if any owner, or part owner, of the ship is domiciled in England.

The jurisdiction of the Court depends upon the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 6.

In order that the claim may be maintainable, the following circumstances must exist:—

*First.* The claim must be made by the owner or consignee or assignee of the bill of lading of goods, and the term “assignee” is to be construed in accordance with 18 & 19 Vict. c. 111, s. 1.<sup>1</sup>

*Secondly.* The goods in respect of which the action is brought must be goods carried or to be carried into England. The word “carried” is interpreted in a wide sense, and the Court will entertain a claim for short delivery of cargo.<sup>2</sup> The word “carried” does not mean imported, but applies where goods are only incidentally brought into an English port.<sup>3</sup>

*Thirdly.* The breach of duty or contract must be in relation to the goods, and connected with damage to them.<sup>4</sup> Thus an action cannot be maintained for a breach of duty committed by the master of the ship before the goods are put on board.

*Fourthly.* No owner or part owner of the ship must be domiciled<sup>5</sup> in England. “Owner” means owner at the time when the damage is done.

(vii) *Any claim for salvage.*<sup>6</sup>

“Salvage is the reward payable for services rendered in saving “any wreck, or in rescuing a ship or boat, or her cargo, or apparel, “or the lives of the persons belonging to her from loss or danger.”<sup>7</sup>

For all details as to the nature of salvage, the reader is referred to books on Admiralty law, and especially to *Williams & Bruce's Admiralty Practice*.<sup>8</sup>

For our present purpose the following points should be noted:—

*First.* The Court of Admiralty had originally no jurisdiction in salvage cases unless the services were performed on the high seas; but the jurisdiction of the Court has been gradually extended by various

<sup>1</sup> See *W. & B.*, p. 122; *The St. Cloud* (1863), *Br. & L.* 4.

<sup>2</sup> *The Danzig* (1863), *Br. & L.* 102.

<sup>3</sup> *The Prote Supervore* (1874), *L. R.* 5 P. C. 482; *The Bahia* (1863), *Br. & L.* 61.

<sup>4</sup> *The Santa Anna* (1863), 32 *L. J. P. & M.* 188.

<sup>5</sup> As to nature of domicile, see Rules 1–11, pp. 82–136, and Rule 19, p. 160, *ante*.

<sup>6</sup> *W. & B.*, Pt. I., chap. vi., pp. 127–186, and especially p. 150. See also as to salvage for saving life, Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 9, and Merchant Shipping Act, 1894, s. 545, taken with Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. (1); *The Willem III.* (1871), *L. R.* 3 A. & E. 487; *The Johannes* (1866), *Lush.* 182; *W. & B.*, p. 130.

<sup>7</sup> “But salvage is not due for services rendered to property lost at sea, other than “a ship, her apparel, or her cargo, or property which had formed part of these, or “freight which was being earned by carriage of the cargo.” *W. & B.*, pp. 127, 128. See *The Gas Float Whitton* (No. 2), [1897] A. C. 337.

<sup>8</sup> See *W. & B.*, chap. vi., p. 127 and following.

statutes, and now, by s. 565 of the Merchant Shipping Act, 1894, it is provided that, subject to certain provisions in that Act,<sup>1</sup> the High Court has "jurisdiction to decide upon all claims whatsoever relating "to salvage, whether the services in respect of which salvage is "claimed were performed on the high seas or within the body of any "county, or partly on the high seas and partly within the body of any "county, and whether the wreck in respect of which salvage is claimed "is found on the sea or on the land, or partly on the sea and partly "on the land."<sup>2</sup>

*Secondly.* The jurisdiction to entertain claims for salvage of life extends to the salvage of life from any British ship wheresoever the service may be performed, and from any foreign ship where the service has been rendered either wholly or in part in British waters, and may, under an agreement with the government of any foreign country, be extended by Order in Council to cases in which the services are rendered by the saving of life from a ship of such foreign country, whether within British waters or not.<sup>3</sup>

(viii) *Any claim for towage<sup>4</sup> against any British<sup>5</sup> or foreign ship.<sup>6</sup>*

(ix) *Any claim for necessities supplied to any foreign ship.<sup>7</sup>*

This claim, which rests upon 3 & 4 Vict. c. 65, s. 6, applies only to *foreign ships*; but a claim against a ship which, at the time when the necessities were supplied, belonged to a foreigner, cannot be defeated by a transfer to a British owner before<sup>8</sup> or after<sup>9</sup> the commencement of the action. The words of the section give the Court jurisdiction to entertain claims for necessities supplied to a foreign ship in a British<sup>10</sup> or colonial port, or upon the high seas,<sup>11</sup> but not for necessities supplied to a foreign ship in a foreign port which is not also a port on the

<sup>1</sup> As to which see W. & B., pp. 143—189.

<sup>2</sup> Merchant Shipping Act, 1894, s. 565, re-enacting Merchant Shipping Act, 1854, s. 476. See further, as to salvage for saving life, Admiralty Court Act, 1861, s. 9; Merchant Shipping Act, 1894, s. 545; W. & B., p. 130; *The Willem III.* (1871), L. R. 3 A. & E. 487; *The Johannes* (1860), Lush. 182.

"It . . . seems a question of some doubt whether the Legislature, by enacting "the provision contained in the 547th section of the Merchant Shipping Act, 1894, "has not again brought back the law to what it virtually was between 1854 and "1868, and provided that the Admiralty Division can no longer exercise any "primary jurisdiction, except with regard to costs and damages, over any claim in "respect of salvage, except where either the value of the property saved exceeds "1,000*l.*, or the amount claimed exceeds 300*l.*" W. & B., p. 151.

<sup>3</sup> Merchant Shipping Act, 1894, s. 545; and W. & B., p. 144, note (g).

<sup>4</sup> 3 & 4 Vict. c. 65, s. 6; W. & B., Part I., chap. viii.

<sup>5</sup> As to meaning of "British" and "foreign," see note 1, p. 788, *ante*.

<sup>6</sup> W. & B., p. 187. Compare *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

<sup>7</sup> 3 & 4 Vict. c. 65, s. 6; W. & B., chap. viii., pp. 190—199; *The Henrich Björn* (1886), 11 App. Cas. 270. See *The Mecca*, [1895] P. (C. A.) 95, overruling *The India* (1863), 32 L. J. P. & M. 185, 186, judgment of Dr. Lushington, and note that cases which do not come within claim ix. may come within claim x.

<sup>8</sup> *The Ella A. Clark* (1863), Br. & L. 32, 37.

<sup>9</sup> *The Princess Charlotte* (1864), 33 L. J. P. & M. 188.

<sup>10</sup> *The Henrich Björn* (1886), 11 App. Cas. 270.

<sup>11</sup> *The Wataga* (1856), Sw. 165; W. & B., p. 191.



high seas,<sup>1</sup> and "it has been laid down in general terms that the " Court will entertain claims for necessities only in cases where the " owners would be liable at common law."<sup>2</sup>

(x) *Any claim for necessities supplied to any ship<sup>3</sup> elsewhere than in the port to which she belongs.<sup>4</sup>*

*This claim is not maintainable if any owner, or part owner, of the ship is domiciled<sup>5</sup> in England.<sup>6</sup>*

This claim, the jurisdiction to entertain which depends upon the Admiralty Court Act, 1861, s. 5, applies whether the ship to which the necessities are supplied be British or foreign.<sup>7</sup>

The jurisdiction to maintain the claim is subject to two restrictions:—

(1) The necessities must not be supplied in the port to which the ship belongs.

(2) No owner of the ship must be domiciled in England or Wales.

(xi) *Any claim of the master or seamen for wages earned on board any British or foreign<sup>8</sup> ship, and of the master for disbursements on account of such ship.<sup>9</sup>*

No distinction is drawn between claims by those serving on board British ships, and claims, either by foreigners or by British subjects, against foreign vessels which happen to be in the ports of this kingdom. At the same time the exercise of this jurisdiction is, as regards a foreign ship, discretionary with the Court; and if the consent of the representative of the government to which the vessel belongs is withheld upon reasonable cause being shown,<sup>10</sup> the Court may decline to exercise its authority.<sup>11</sup>

(xii) *Any claim for building, equipping, or repairing any British or foreign<sup>12</sup> ship, where, at the commencement of the action, the ship is, or the proceeds thereof are, under arrest.<sup>13</sup>*

(xiii) *Any claim to enforce a judgment in rem obtained against a British or foreign ship in a foreign Court.<sup>14</sup>*

<sup>1</sup> *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

<sup>2</sup> W. & B., p. 192.

<sup>3</sup> *I.e.*, any ship, whether British or foreign. See *The Mecca*, [1895] P. (C. A.) 95, overruling *The India* (1863), 32 L. J. P. & M. 185.

<sup>4</sup> 2. & 25 Vict. c. 10, s. 5: W. & B., p. 197; *The Pacific* (1864), Br. & L. 243; *Ex parte Michael* (1872), L. R. 7 Q. B. 658; *The Two Ellens* (1872), L. R. 4 P. C. 161; *The Heinrich Björn* (1886), 11 App. Cas. 270; *The Ella A. Clark* (1863), Br. & L. 32.

<sup>5</sup> As to nature of domicile, see Rules 1—11, pp. 82—136, *ante*.

<sup>6</sup> *The Bahia* (1863), Br. & L. 61.

<sup>7</sup> *The Mecca*, [1895] P. (C. A.) 95.

<sup>8</sup> W. & B., p. 211. See *The Mecca*, [1895] P. (C. A.) 95.

<sup>9</sup> Admiralty Court Act, 1861, s. 10; W. & B., Pt. I., chap. ix., pp. 200—221.

<sup>10</sup> *The Leon XIII.* (1883), 8 P. D. (C. A.) 121.

<sup>11</sup> *The Nina* (1867), L. R. 2 P. C. 38. See W. & B., p. 211.

<sup>12</sup> *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

<sup>13</sup> W. & B., pp. 198, 199; 24 Vict. c. 10, s. 4; *The Aneroid* (1877), 2 P. D. 189.

<sup>14</sup> *The City of Mecca* (1879), 5 P. D. 28; (1881), 6 P. D. (C. A.) 166; *The Bold Buccleugh* (1851), 7 Moore, P. C. 267; W. & B., p. 121.

A judgment *in rem* was obtained against a ship in a foreign Court of Admiralty whereby the plaintiff in the foreign action was entitled to recover 25,000*l*. The judgment not having been satisfied, the ship comes into an English port. *A*, the plaintiff in the foreign action, brings an action *in rem* against the ship in respect of the foreign judgment. The Court has jurisdiction to entertain the action.<sup>1</sup>

This claim (it is submitted) may be put in a more general form, and it may be laid down that the Court has jurisdiction to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists.

## NOTE 12.

### THEORIES OF DIVORCE.

The doctrine maintained by the Courts of any country with regard to jurisdiction in matters of divorce and points connected therewith ultimately depends upon the view entertained by such Courts with regard to the nature of divorce. On this matter three different theories, resting at bottom on the different views which may be taken of marriage, have been maintained at different times and in different countries. These theories may for convenience be termed the "contractual theory," the "penal theory," and the "status theory" of divorce.

(A) **The Contractual Theory.**—Marriage may be regarded mainly as a contract between the parties thereto. On this view of marriage, divorce is naturally regarded as the rescission of the marriage contract, on the terms or conditions (if any) for its determination agreed upon between the parties at the time of the marriage; as, for example, that it might be put an end to on the ground of incompatibility of temper, or of the husband's desertion of the wife. Even on what may be termed the extreme contractual theory, marriage has never in modern times been put on exactly the same footing as other agreements. The conditions of the contract, as to its rescission and otherwise, have never, in Christian countries at least, been held to be subject to variation at the will of the parties, but have always been treated as determined by the law of the country under the law whereof the marriage is made. It has further been almost universally held that a marriage can be dissolved only by public authority. Still, on the contractual view, a divorce may fairly be described as the rescission of a contract, and the right to divorce may be regarded as the right of

<sup>1</sup> *The City of Mecca* (1881), 6 P. D. (C. A.) 106. The action failed in the particular case because the foreign judgment was not a judgment *in rem*, but the principle was apparently admitted. The jurisdiction does not depend upon statute.

the party aggrieved to have the marriage contract rescinded on the conditions, if any, agreed upon between the parties with reference to its rescission.

*Results of Theory.*—From this theory two consequences naturally ensue. First, if the parties marry under a law which, like that of England before 1858, or of modern Italy, does not recognise divorce, neither of them can have under any circumstances the right to petition the tribunals of any country whatever for a divorce. For a person who has married, for instance, under the law of Italy, has entered into an agreement, one of the terms of which is that it shall never be rescinded. He cannot, therefore, have, in virtue of this contract, a ground for applying to the Courts of any country whatever for its rescission.<sup>1</sup> Secondly, jurisdiction in matters of divorce belongs, on this view, exclusively to the tribunals of the country under the law of which the marriage was celebrated. The latter conclusion is no doubt not an inevitable, but is certainly a natural, result of the general theory.

*Defects of Theory.*—The contractual theory, though often maintained, has never been found satisfactory.<sup>2</sup> The parties to a marriage do not, in fact, contemplate its rescission, but intend to enter into an agreement for life. The intervention, again, of the state aims rather at the punishment of an offender or the relief of a person injured by the misconduct of another, than at the giving effect to a contract.

(B) **Penal Theory.**—Marriage may be regarded as a contract imposing on each of the parties duties in the fulfilment of which the state is so much concerned that the breach thereof exposes the offender to legal penalties. On this view of marriage a divorce is naturally regarded as the penalty inflicted by the state on offences against the marriage relation.

*Results of Theory.*—The “penal theory” is inconsistent with the view that the right to divorce depends on the terms imposed by the law under which the parties married. The liability to divorce depends, on the penal theory, like the liability to other criminal punishments, on the law of the place where the criminal is residing, or where the offence is committed. Hence, jurisdiction in matters of divorce is, on this view, given by the temporary residence of married persons within a given country, especially if the offence against the marriage relation, *e.g.*, adultery, is committed within the limits of such country. The penal theory of divorce has not, on the whole, been favoured by English tribunals,<sup>3</sup> but has certainly influenced Scotch Courts, and

<sup>1</sup> *Tovey v. Lindsay* (1813), 1 Dow. 117, 131, 140.

<sup>2</sup> *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Mordaunt v. Mordaunt* (1870), L. R. 2 P. & D. 109, 126, judgment of Lord Penzance.

<sup>3</sup> *Mordaunt v. Moncrieffe* (1874), L. R. 2 Sc. Ap. 374. Thus a committee of a lunatic may bring a suit for the dissolution of the lunatic's marriage. *Baker v. Baker* (1880), 5 F. D. 142. “Proceedings of this kind [*i.e.*, for divorce] are not “criminal, and if not criminal then they must be civil, for there cannot be quasi-

affords the theoretical justification for the freedom with which they have in practice exercised jurisdiction in matters of divorce.<sup>1</sup>

*Defects of Theory.*—This theory has at least two defects. Divorce, in the first place, is not of necessity a penal proceeding. It may, as in countries where it is granted because of the lunacy of one of the parties to the marriage, not be the punishment for any offence, and is, in any case, far more naturally looked upon as a measure of relief to the husband or wife, or to both, than as a punishment to either. In the second place, if divorce be the punishment for a crime, there is a difficulty in seeing why it should have an extra-territorial effect.

(C) **Status Theory.**—Marriage may be regarded as a contract which creates or constitutes a special status, viz., the status or condition of husband and wife. On this view of marriage a divorce is the act by which a state through a public authority dissolves or puts an end to the marriage status.

*Results of Theory.*—First, the claim to divorce has, on this view, no connection with the terms of the marriage contract, for a divorce is not the rescission of an agreement, but the extinction of a status, the continuance of which is in the judgment of the state inexpedient, whether on grounds of justice or of policy. Hence, secondly, the fact that the parties were married under a law which did not recognise divorce affords no reason why the Courts of a state, the law of which does recognise divorce, should not dissolve their marriage. Thirdly, jurisdiction to dissolve a marriage naturally belongs on this view exclusively to the tribunals of the country where the parties are domiciled. For this is, according to the doctrine generally prevalent, the country to which the parties belong, and by the law of which their status is determined.<sup>2</sup> Fourthly, a judgment pronounced by such tribunals has effect everywhere.

It should be noticed that the Courts of countries, whose law makes allegiance and not domicile determine a person's status, would naturally hold that the right to divorce depends on the law of the country of which the parties to a marriage are citizens, and that jurisdiction in matters of divorce belongs exclusively to the Courts of such country.

“civil or quasi-criminal cases.” *Branford v. Branford* (1878), 4 P. D. 72, 73, judgment of Hannen, President.

<sup>1</sup> For Scotch views of divorce jurisdiction, see Mackay, Court of Session, ii., pp. 262—268.

<sup>2</sup> See judgment of Brett, L. J., *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 9; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Bater v. Bater*, [1906] P. (C. A.) 209, 238.

## NOTE 13.

EFFECT OF FOREIGN DIVORCE ON ENGLISH  
MARRIAGE.

(A) *State of the Law before 1858.*—Till the year 1858, when the Matrimonial Causes Act, 1857, came into operation, our Courts inclined towards the contractual theory of divorce,<sup>1</sup> and on the whole held that the right to divorce depended on the terms of the marriage contract.<sup>2</sup> \*From this theory, combined with the fact that no means then existed by which a marriage could be dissolved in due course of law by the English Courts,<sup>3</sup> arose two doctrines which, on the whole, received the approval of English tribunals.

The first doctrine was that no foreign Court could, under any circumstances, pronounce a divorce which should be held valid in England of the parties to an English marriage. This view, which was a legitimate inference from the premises on which it was based, may be termed the received doctrine. No decision can be cited which shows that our Courts ever, prior to 1858, recognised the right of foreign tribunals to dissolve an English marriage, and several decisions exist which can hardly with fairness be interpreted as consistent with the opinion that an English marriage was, under any circumstances, dissoluble.<sup>4</sup> But, though the dogma that an English marriage was indissoluble was the received opinion of the Courts, it was one which never obtained decisive judicial sanction. The cases which could be cited in its support do not go further than showing that our Courts would not recognise a divorce when the parties to it were not domiciled in the country where the divorce was obtained, and it has even been maintained that the position, that a foreign tribunal can dissolve an English marriage when the parties thereto are domiciled within its jurisdiction, is consistent with all English decisions, though it may not be consistent with the resolution of the judges in *Lolley's Case*.<sup>5</sup> Though, in short, before 1858, the contractual theory was, on the whole, predominant, yet it never received full legal recognition, while its effects were counteracted by the partial influence of what we have termed the status theory of divorce.<sup>6</sup>

The second doctrine resulting from the contractual theory was that every marriage celebrated in England was an English marriage, and,

<sup>1</sup> See Note 12, *ante*.

<sup>2</sup> *Toney v. Lindsay* (1813), 1 Dow. 117, 131, 140.

<sup>3</sup> *Wilkinson v. Gibson* (1867), L. R. 4 Eq. 162, 168.

<sup>4</sup> *Lolley's Case* (1812), 2 Cl. & F. 567; *Macarthy v. De Caux* (1831), 2 Cl. & F. 568.

<sup>5</sup> *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 85.

<sup>6</sup> *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Conway v. Beazley* (1831), 3 Hagg. Ecc. 639.

therefore, indissoluble by the decree of a foreign tribunal. Hence it was on one occasion decided that the marriage in England of a Dane domiciled in Denmark could not, as far as effects in England went, be dissolved by a Danish divorce. The conclusion, however, that every marriage celebrated in England was an English marriage, and, therefore, indissoluble, was erroneous, even on the contractual theory of divorce. For even if the right to divorce depends on the terms of the marriage contract, these terms are fixed by the law of the country subject to which the marriage is made, which, no doubt, is in general the law of the country where the marriage is celebrated, but may be the law of the country where the husband is domiciled. This was perceived long before the passing of the Matrimonial Causes Act, 1857, and the better, though not the predominant opinion became, that the marriage in England between parties of whom the husband was domiciled, for example, in Scotland, was not an English but a Scotch marriage, and, therefore, not affected by the rule making English marriages indissoluble.<sup>1</sup> The state of the law, therefore, prior to 1858, may be thus summed up.

*First.* An English marriage was generally held to be indissoluble, though some lawyers inclined to the opinion that when the parties to such a marriage were domiciled in a foreign country they might obtain a divorce which would be held valid in England.

*Secondly.* The Courts often identified a marriage celebrated in England with an English marriage, but the better opinion was that the character of a marriage depended on the domicile of the husband at the time of its celebration.

(B) *State of the Law since 1858.*—Our Courts have, since 1858, surrendered the theory that an English marriage cannot be dissolved by a foreign divorce, and admit that where the parties to such a marriage are *bonâ fide* domiciled in a foreign country, the tribunals of that country have jurisdiction to pronounce a divorce which will be held valid in England. This view of the present state of the law has been put forward throughout this treatise,<sup>2</sup> and can be maintained with confidence on the following grounds:—

*First.* The Matrimonial Causes Act, 1857, strikes at the root of the theory that no English marriage can be dissolved by a foreign Court. For the Act, by providing regular means for divorce, disposes of the contention that an English marriage is a contract entered into on the terms that it shall never be rescinded; and further, being applicable to marriages made before the time when the Act passed, amounts to something like a legislative declaration that the right to divorce does not depend upon the terms of the marriage contract.

<sup>1</sup> *Warrender v. Warrender* (1835), 2 Cl. & F. 488. See, now, *Harvey v. Farnie* (1882), 8 App. Cas. 43.

<sup>2</sup> See Rule 86, p. 381, *ante*.

*Secondly.* Even independently of the effect of the Act, English judges have, in modern times, shown an inclination to reject the contractual theory of divorce,<sup>1</sup> and, at the same time, have, on one occasion, at least, distinctly repudiated what we have termed the penal theory.<sup>2</sup>

*Thirdly.* It is now clearly decided that the Courts of a country where a husband and wife are domiciled at the time of proceedings for divorce have jurisdiction, and, subject to certain very limited exceptions, have exclusive jurisdiction<sup>3</sup> to divorce such husband and wife. Hence a divorce pronounced by a divorce Court of a foreign country where the parties to an English marriage are domiciled will dissolve an English marriage and be held valid in England, and this even though the divorce is granted for a cause which would not be held a ground for divorce under the law of England.<sup>4</sup>

A foreign divorce, therefore, if pronounced by a divorce Court of the country where the parties to an English marriage are domiciled, will, under the present state of the law, dissolve an English marriage and be held valid in England.

(C) *Jurisdiction of Scotch Courts to dissolve an English marriage?*—The Scotch Courts adopting in the main the “penal” theory of divorce<sup>5</sup> have never admitted that the fact of a marriage being celebrated in England, or of its being in strictness an English marriage, deprives them of jurisdiction to grant a divorce.<sup>6</sup>

They have further maintained that jurisdiction is given by:—

(1) the commission in Scotland of a divorce offence (*locus delicti*) and the personal citation of the defendant;<sup>7</sup> or

(2) the residence of the parties (*i.e.*, in effect of the husband) in Scotland for a period of forty days;<sup>8</sup> or

(3) the *bonâ fide* domicil of the parties in Scotland.

The English Courts have never conceded the validity of all the claims put forward by Scotch tribunals. They showed at one time, as already pointed out,<sup>9</sup> a disposition to maintain that every marriage celebrated in England was an English marriage, and that a Scotch divorce could not dissolve an English marriage as regards its effect in

<sup>1</sup> *Mordaunt v. Mordaunt* (1870), L. R. 2 P. & D. 109, 127; *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 90, 91.

<sup>2</sup> *Mordaunt v. Moncrieffe* (1874), L. R. 2 Sc. Ap. 374.

<sup>3</sup> See Exception to Rule 52, p. 263, *ante*, and Exception to Rule 87, p. 386, *ante*.

<sup>4</sup> *Scott v. Attorney-General* (1886), 11 P. D. 128; *Bater v. Bater*, [1906] P. (C. A.) 209; *conf. In re Stirling*, [1908] W. N. 130.

<sup>5</sup> See p. 795, *ante*; *Utterton v. Tewsh* (1811), Ferg. Div. Cases, 23.

<sup>6</sup> 2 Fraser, “Treatise on Husband and Wife,” 2nd ed., pp. 1276—1294; *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

<sup>7</sup> 2 Fraser, 2nd ed., 1288, 1289.

<sup>8</sup> See *Ringer v. Churchill* (1840), 2 D. 302; *Jack v. Jack* (1862), 24 D. 467; 2 Fraser, pp. 1276—1283.

<sup>9</sup> Page 795, *ante*.

England,<sup>1</sup> and have since no less than before the passing of the Matrimonial Causes Act, 1857,<sup>2</sup> strenuously maintained that no decree of a Scotch Court can divorce the parties to an English marriage, unless they are domiciled in Scotland at the time of the divorce. This difference of view as to jurisdiction in the matter of divorce has led to some practical inconvenience and to much debate. The result, however, of a controversy which has now lasted for years is not altogether unsatisfactory, and may be thus summed up:—

The Scotch Courts, as represented at any rate by the House of Lords, would appear to have surrendered the claim to dissolve the marriage of persons not domiciled in Scotland, or at least to look with great doubt on the doctrine that either the *locus delicti* or residence for forty days gives jurisdiction in matters of divorce.<sup>3</sup> It is, however, perfectly clear that the Scotch Courts, even if they surrender other grounds of jurisdiction, claim jurisdiction to dissolve the marriage of any persons domiciled in Scotland.<sup>4</sup>

As the English Courts have now conceded that an English marriage may be dissolved by the tribunals of any country where the parties are domiciled at the time of their divorce,<sup>5</sup> it follows that a Scotch divorce will be held valid in England if the parties to the marriage are at the time of the divorce domiciled in Scotland, and unless they are so domiciled will in general not be held valid.

#### NOTE 14.

#### DIVORCES UNDER THE INDIAN DIVORCE ACT, &c.

##### *Indian Divorces.*

*Is a divorce granted under the Indian Divorce Act, No. IV. of 1869, on the petition of a person resident, though not domiciled in India, valid?*

This inquiry comprises two separate questions:—

*First question. Is such a divorce valid in British India?*

*Answer.* The right reply to this inquiry depends upon the language of the Indian Divorce Act, No. IV. of 1869.<sup>6</sup>

The material parts of that Act run as follows:—

Sec. 2 (part). “This Act shall extend to the whole of British India, “and (so far only as regards British subjects within the dominions

<sup>1</sup> *Lolley's Case* (1812), 2 Cl. & F. 567.

<sup>2</sup> *Shaw v. Gould* (1868), L. R. 3 H. L. 55.

<sup>3</sup> *Pitt v. Pitt* (1864), 4 Macq. 627; *Jack v. Jack* (1862), 24 D. 467; *Ringer v. Churchill* (1840), 2 D. 302.

<sup>4</sup> *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

<sup>5</sup> See Rule 86, p. 381, *ante*; and *Bater v. Bater*, [1906] P. (C. A.) 209.

<sup>6</sup> No one will seriously maintain that the Act is an enactment which, as regards British India, lies beyond the legislative authority of the Governor-General in Council. See Ilbert, *Government of India* (2nd ed.), p. 199.



"hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty.

"Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition ;

"or to make decrees of dissolution of marriage except in the following cases :—(a) Where the marriage shall have been solemnized in India. . . ."

Sect. 7. "Subject to the provisions contained in this Act, the High Courts, and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

The meaning of these enactments is open to some doubt. The word "resides" in sect. 2 may (it has been suggested) mean "is domiciled in India."<sup>1</sup> It is again possible, though not likely, that sect. 7, which requires the Indian Divorce Courts to give relief on principles and rules which are as nearly as may be conformable to the principles and rules on which the English Divorce Court for the time being acts and gives relief, indirectly imposes on the Indian Courts the duty of following the doctrine now maintained by the English Divorce Court,<sup>2</sup> as also by the Privy Council,<sup>3</sup> that domicile, as contrasted with residence, is the proper basis of divorce jurisdiction ; and if either s. 2 or s. 7 of the Indian Divorce Act could be construed in the way suggested, a divorce granted to a petitioner residing, though not domiciled in India, would be invalid in India and everywhere else, for the simple reason that it would not be granted in accordance with the Indian Divorce Act. But the proposed construction of s. 2, as also of s. 7, is forced. The natural interpretation of these enactments is that the Indian Courts have jurisdiction, other conditions being fulfilled, to grant a divorce to a petitioner who resides, though he is not domiciled, in India.<sup>4</sup> This explanation of the enactments referred to is confirmed, if not necessitated, by two considerations. The first is, that on the 26th of February, 1869, Maine, when moving that the Report of the Select Committee on the Divorce Bill should be taken into consideration, stated in so many

<sup>1</sup> See Rattigan, Law of Divorce (India), p. 11.

<sup>2</sup> *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, 442.

<sup>3</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 540.

<sup>4</sup> But although, for the purposes of Indian municipal law, mere residence in India is sufficient, it is submitted that such residence must at least be *bond fide* and must not be mere colourable residence for the purpose of obtaining relief under the Act, nor, probably, must it be the sojourn in India of a mere casual traveller. See Rattigan, p. 6.

words that "sect. 2 of the Bill does not make it a condition that the petitioner should be domiciled" in India, and explained his reasons for basing the divorce jurisdiction of the Indian Courts on residence rather than on domicile.<sup>1</sup> The second consideration is that Indian Divorce Courts have in fact granted divorces to petitioners not domiciled in British India. We may conclude then with confidence that the Indian Courts have jurisdiction to grant divorce to a person resident, though not domiciled in India, and (what is really the same thing) that such a divorce is valid in India.

*Second question.—Is such a divorce valid in England?*

*Answer.*—It would, at first sight, appear that this inquiry must receive a negative reply, and this on the following grounds. It is, in the first place, now the accepted doctrine both of the Probate, &c. Division of the High Court,<sup>2</sup> of the House of Lords,<sup>3</sup> and of the Privy Council,<sup>4</sup> that a decree for the dissolution of marriage must, in order to have extra-territorial validity, be granted by the Courts of the country where the parties, one of whom is petitioning for a divorce, are domiciled.<sup>5</sup> This principle certainly applies to the jurisdiction of the Divorce Courts of strictly foreign countries, *i.e.*, countries not forming part of the British dominions, and it must be admitted that as regards the application of the rules of private international law, English Courts in general regard every country which forms part of the British dominions, except, of course, England itself, as a foreign<sup>6</sup> country. *Lolley's Case*,<sup>7</sup> in the second place, implies, or it may be said decides, that a divorce granted by a Divorce Court to a petitioner domiciled in England but resident in Scotland, though valid by the law of Scotland, is not valid in England. It has, in the last place, been decided by the Privy Council in *Le Mesurier v. Le Mesurier*<sup>8</sup> that the Ceylon Courts have no jurisdiction to dissolve the marriage of persons not domiciled in Ceylon, and it is a natural assumption that the rule applied to Ceylon is applicable also to British India. One passage, indeed, of the judgment of the Privy Council in *Le Mesurier's Case* distinctly implies that the Court of a country, and apparently of a country forming part of the British dominions, may have divorce jurisdiction which is effective within the territory of such country, but has not necessarily extra-territorial effect.

"In order to sustain," say their lordships, "the competency of the

<sup>1</sup> *Life and Speeches of Sir Henry Maine*, pp. 101, 102.

<sup>2</sup> *Green v. Green*, [1893] P. 89.

<sup>3</sup> *Shaw v. Gould* (1868), L. R. 3 H. L. 55.

<sup>4</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

<sup>5</sup> "Their Lordships have . . . come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." *Ibid.*, p. 540.

<sup>6</sup> See p. 71, *ante*.

<sup>7</sup> (1812), 2 Cl. & F. 567, n.

<sup>8</sup> [1895] A. C. 517.

“present suit, it is necessary for the appellant to show that the [divorce] jurisdiction assumed by the district judge of Matara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country.”<sup>1</sup>

As, however, the Courts of Ceylon did not claim divorce jurisdiction under any local law, it was unnecessary to consider, and nothing in *Le Mesurier's Case* decides, what would be the extra-territorial effect of a divorce granted under such domestic rule; still less does the case decide that the Indian Divorce Act must be considered as standing in the same position as a merely “domestic rule of the Roman-Dutch law.” A further argument against the extra-territorial validity of a divorce granted under the Indian Divorce Act to a petitioner not domiciled in India may be drawn from the effect (prior to the passing of the Deceased Wife's Sister's Marriage Act, 1907) of a marriage under the law of a colony between a man and his deceased wife's sister when residing though not domiciled in such country. It would appear that such a marriage, though valid in the colony where it was celebrated, was of very dubious validity in England,<sup>2</sup> and the invalidity in England of such a marriage points towards the possible invalidity in England of a divorce which might be valid in India.

But though arguments against the validity of a divorce granted in India to a petitioner not there domiciled are certainly not without force, the better opinion is (it is submitted with some confidence) that a divorce under the Indian Divorce Act valid in India, is valid in England, and, indeed, throughout the British dominions.

The various considerations which tell against its validity are not conclusive. *Lolley's Case*, if it could now be relied upon, might seem to establish that a divorce valid under Scotch law is, if the petitioner has an English domicil, invalid in England; but *Lolley's Case* can at the present day hardly be treated as an authority. It was, in fact, decided in accordance with the now obsolete doctrine, which was far more easily maintainable in 1812 than it is in 1908, that an English marriage could not be dissolved by the decree of any foreign Court whatever.<sup>3</sup> Whether, further, the divorce relied upon in *Lolley's*

<sup>1</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. p. 527.

<sup>2</sup> Compare Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. VII. c. 30).

<sup>3</sup> See Note 13, “Effect of Foreign Divorces on English Marriage,” p. 797, *ante*.

*Case* was valid, even according to the law of Scotland, is now most questionable. For our own present purpose *Lolley's Case* may then be dismissed from consideration. *Le Mesurier's Case*, again, hardly in fact touches, it certainly does not determine, the point in debate. The only points absolutely determined thereby are that, to use the language of the headnote :—“The matrimonial law applicable to British or European residents in Ceylon is the Roman-Dutch law as it existed in the Colony at the date of the Royal Proclamation of the 23rd of September, 1799; and that law did not contain any rule specially conferring on the local Courts divorce jurisdiction *à vinculo* over European spouses resident in the island, but whose marriage and domicile were in England,” and that in the absence of such rule the Courts of Ceylon did not, in the case of spouses not domiciled in Ceylon, possess jurisdiction to pronounce a divorce which should, by the general law of nations, possess extra-territorial validity. In truth, the decision of the case mainly turned on the answer to the question whether a so-called matrimonial domicile created by a *bonâ fide* residence of the spouses in Ceylon, but of a less degree of permanence than is required to fix their true domicile, gave to the Courts of Ceylon divorce jurisdiction. The Courts of Ceylon themselves and the Privy Council distinctly answered this question in the negative. The argument drawn from the invalidity in England prior to 1907 of a marriage which was valid under the law of a colony, though the parties were domiciled in England, is assuredly not decisive. It may be said that a person domiciled in England is, in respect of capacity to marry, subject to the law of England, and that till the recent change in the law a person domiciled in England was absolutely incapable of marrying his deceased wife's sister. The question as to the divorce jurisdiction of Indian Courts is different from any question as to matrimonial capacity possessed by a person domiciled in England.

The arguments, in short, against the validity of the divorce granted under the Indian Divorce Act, the authority whereof depends on an Act of Parliament, are, it is submitted, not strong enough to show that a divorce valid in India is invalid in England. The Indian Act is a very different thing from the “domestic rule of Roman-Dutch law,” which might possibly be in force in a colony acquired from Holland. It is in the highest degree improbable that Parliament intended a divorce which was effective in India should be invalid in England. Every word of the Indian Act, and especially the provision that it shall not apply except “where the marriage shall have been solemnized in India,” show the intention on the part of the Indian legislature that there shall be no conflict between the law of India and the law of England. It is arguable, though hardly maintainable, that the operation of the Indian Act must be confined to persons domiciled

in India, but if once it be admitted that a divorce granted to a person resident in India but domiciled in England is valid in India, it is difficult, though not impossible, to avoid the conclusion that it is valid in England, and in every other part of the British dominions. The inquiry raised at the beginning of this Note may then be thus answered: A divorce of the kind contemplated is all but certainly valid in India, and is far more probably than not valid in England, and in every part of the British dominions.

*Colonial Divorces.*

In many British colonies the law as to divorce jurisdiction is in effect the same as in England, and *Le Mesurier v. Le Mesurier* is fully accepted as an authoritative exposition of English law. A divorce granted in such colonies would be granted only where the spouses are there domiciled, and will be valid in other parts of the British dominions. There are other British colonies in which, under colonial Acts, divorce jurisdiction depends—partly, at any rate—upon the residence, as contrasted with the domicile of the petitioner. To a divorce granted under the law of such a colony, *e.g.*, New South Wales, the conclusions arrived at in respect to an Indian divorce in substance apply. A colonial divorce granted, in conformity with a colonial Act, to a petitioner not there resident will all but certainly be valid in the colony, and probably, though not certainly, would be valid in England, and throughout the British dominions.

To Indian and Colonial divorces alike one remark is applicable. If English Courts admit the extra territorial validity of a divorce granted in India, or in a colony, to a petitioner not there domiciled, they will probably be driven to relax the rigidity of the rule that divorce jurisdiction depends wholly on domicile, and, as English judges already seem inclined to do,<sup>1</sup> will soon come to hold that a wife deserted by her husband, who has also changed his domicile, may, for the purpose of obtaining a divorce, possess a domicile different from that of her husband. If, on the other hand, our Courts adhere strictly to the theory which bases divorce jurisdiction upon domicile, cases will certainly arise, in which *H* and *W*, who in an English colony are held to be duly divorced, and therefore unmarried, will in England be held to be still husband and wife, and therefore each liable to punishment for bigamy should he or she during the lifetime of the other attempt to effect a second marriage; there is danger lest a person should be held unmarried in one part and married in another part of the British dominions, just as, in virtue of *Haddock v. Haddock*,<sup>2</sup> a person who is held in one of the United States to be duly divorced and single may in another of the United States be held to be a married person.

<sup>1</sup> *Ogden v. Ogden*, [1908] P. (C. A.) 46.

<sup>2</sup> (1906), 26 Sup. Ct. Rep. 525.

## NOTE 15.

THE THEORETICAL BASIS OF THE RULES AS TO THE  
EXTRA-TERRITORIAL EFFECT OF A DISCHARGE IN  
BANKRUPTCY.

The theoretical basis on which rest the Rules<sup>1</sup> as to the extra-territorial effect of a discharge in bankruptcy is hard to discover.

They are not grounded on the jurisdiction of the Court to adjudge a debtor bankrupt, for they are in no way affected by his domicile.<sup>2</sup> They do not rest wholly upon the territorial authority of the sovereign by whom a bankruptcy law is enacted, for if they did, a discharge in bankruptcy would logically in no case have any extra-territorial operation. They do not, lastly, depend wholly upon the proper law of the contract under which the liability from which a bankrupt is discharged has arisen,<sup>3</sup> for no reference to the proper law of a contract can explain how it is that a discharge under an Act of the Imperial Parliament is in England a discharge from a debt owing by a Frenchman to another Frenchman which is both contracted and payable in France, nor generally how it is that a discharge in bankruptcy under the law of a given country is in that country treated as a discharge from any debt wherever incurred or wherever payable.<sup>4</sup>

The explanation, if not the logical justification, of the effect given by our Courts to a discharge in bankruptcy is to be found in the influence exerted on the minds of English judges by two different, though not inconsistent, views of the same legal transaction.

*First.* A discharge may be looked upon as a command given by the sovereign of a country to the Courts thereof that they shall treat a bankrupt *debtor* as freed from liability for his debts. If the matter be regarded from this point of view, the operation of a discharge depends upon the territorial limits assignable to the authority of the legislature or sovereign by whose command the discharge is given. Hence a bankrupt is freed from liability throughout the whole of a sovereign's territory from every debt wherever contracted or payable. This is the explanation of Rules 114 and 117,<sup>5</sup> and in general terms of the effect of a discharge within the country under the law of which it is obtained on debts contracted in other countries.<sup>6</sup>

<sup>1</sup> See Rules 114—117, pp. 435—441, *ante*.

<sup>2</sup> *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399.

<sup>3</sup> The influence of the "proper law" (see Rule 146, p. 529, *ante*) is treated as the decisive consideration in *Gibbs v. Société Industrielle*, and other cases.

<sup>4</sup> See Rule 114, p. 435, *ante*.

<sup>5</sup> See pp. 435—441, *ante*.

<sup>6</sup> See *Ellis v. McHenry* (1871), L. R. 6 C. P. 228.

*Secondly.* A discharge may, from another point of view, be looked upon as a mode in which a debtor is freed from his liability in accordance with the contract between the debtor and his creditor, or rather as a mode of terminating liability under a contract which was contemplated as possible by the parties at the time they entered into their agreement, or, in other words, at the time when the contract was made.<sup>1</sup>

On this latter view of the matter, the extra-territorial operation of a discharge in bankruptcy must depend on the result of the inquiry whether the law under which the debtor is made bankrupt is also the proper law of the contract.<sup>2</sup> If an affirmative answer be given, the discharge ought to be valid everywhere; if a negative answer be given, the discharge ought to have, at any rate, no extra-territorial operation. And this, it is conceived, is the predominant doctrine of English Courts as to any discharge which does not take place under an Act of the Imperial Parliament, and affords the explanation of Rules 115 and 116.<sup>3</sup> They lead to this result: viz., that a discharge under any bankruptcy taking place outside the United Kingdom is a valid discharge everywhere from any debt which is contracted [or probably which is payable] in the country of the bankruptcy,<sup>4</sup> and is not a discharge from any debt which is neither incurred nor payable in such country;<sup>5</sup> which comes round, in other words, to the statement that the validity of a discharge depends upon its being a release from the debt under the proper law of the contract.

There is, it is true, as already pointed out, some question whether a discharge under the law of a country where a debt is payable, but is not contracted, has an extra-territorial effect.<sup>6</sup> But this difficulty, such as it is, arises from the doubt which runs through the English law of contract whether, when the law of a country where a contract is made (*lex loci contractus*) and the law of the country where it is to be performed (*lex loci solutionis*) are different, the *lex loci solutionis* is or is not the proper law of the contract; and it is very characteristic of English law that the *lex loci contractus* should, in reference to the effect of a discharge, be constantly assumed to be the proper law of the contract.

But the truth is that, in maintaining the extra-territorial effect of a discharge in accordance with the *lex loci contractus*, English lawyers have probably been influenced by both the views which may be taken of the nature of a discharge. If the discharge be looked upon

<sup>1</sup> See *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 405, 406, passage from judgment of Esher, M. R., cited pp. 439, 440, *ante*.

<sup>2</sup> As to meaning of "proper law of contract," see Rule 146, p. 529, *ante*.

<sup>3</sup> See pp. 436, 439, *ante*.

<sup>4</sup> See Rule 115, p. 436, *ante*.

<sup>5</sup> See Rule 116, p. 439, *ante*.

<sup>6</sup> See pp. 436—438, *ante*.

as the command of a sovereign, it may well be held that debts incurred within his territory are at once extinguished by his order, or, in other words, that (to take a particular case) an English law can extinguish English debts. If, on the other hand, a discharge be regarded in the light of a release from liability in accordance with the terms of a contract, then the *lex loci contractus* being, according to the doctrine of English law, presumably, at any rate, the proper law of a contract, it follows that a discharge under the law of the country where a debt is incurred is a discharge in accordance with its proper law, and therefore extra-territorially valid.

However this may be, the extra-territorial effect of a discharge in bankruptcy can be explained, and can, it is submitted, be explained only by keeping in view the two-fold character of a discharge as the command of a sovereign and a mode of release under the terms of a contract.

#### NOTE 16.

#### LEGITIMATION.

*Question.*—Do English Courts ever in strictness admit the legitimacy of a person born out of lawful wedlock?

To this question two different answers have been given:—

*First answer.* English Courts do not in strictness admit the legitimacy of any person born out of lawful wedlock.

This answer was at one time, at any rate, plausible. The Scotch cases, such as *Udny v. Udny*,<sup>1</sup> are, it was argued, decisions as to Scotch law, and only determined that the son of a man domiciled in Scotland can, under Scotch law, be legitimated by the subsequent marriage of his parents. Nor do most of the cases regulating succession to movables go further than deciding that such succession is governed wholly by the law of the country where the deceased intestate or testator dies domiciled. An illegitimate child may, on this principle, claim movable property in England, if the law of his father's domicile entitles him to share in the succession.<sup>2</sup> The fact, therefore, that a legitimated person may succeed to his father's movable property under the law of his father's domicile no more proves that our Courts recognise a legitimated person as legitimate, than the fact that an adopted child may, under the law of the deceased's domicile, succeed to movable property in England as an adopted son proves that English law recognises relationship by adoption.

*Second answer.* Our Courts hold that the question of a child's legitimacy is to be determined by the law of the father's domicile, at

<sup>1</sup> (1869) L. R. 1 Sc. App. 441.

<sup>2</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.



the time of the child's birth, taken together with the law of the father's domicile at the time of the subsequent marriage of the child's parents, and, when a person is legitimated under these two laws, fully admit his legitimacy.

This; it may now be laid down with confidence, is the right reply to a question which not many years ago did not admit of a perfectly certain answer.

*D*, an unmarried woman, died intestate and domiciled in England. *A*, the child of *D*'s brother, was born before her father's marriage, but whilst he was domiciled in Holland, and was, whilst *A*'s parents were still domiciled in Holland, legitimated there by their marriage. It was held by the Court of Appeal that *A* was entitled, as next of kin, to succeed to the movable property of *D*, *A*'s aunt, who, as already mentioned, died intestate and domiciled in England, or in other words, *A* was recognised in England as the legitimate child of her father, and as such entitled to succeed to the movable property of *A*'s aunt under the Statute of Distributions.<sup>1</sup>

This case is decisive, for, since the intestate was an Englishwoman, dying domiciled in England, it is clear that her movable property could devolve only upon persons who were her legitimate next of kin under the Statute of Distributions, and therefore the decision in favour of *A*'s claim was in the strictest sense a decision in favour of *A*'s legitimacy.<sup>2</sup> The principle involved in this decision has, since it was given, been carried a step further. Where real estate in England was devised by a testator to the children of *D*, who was domiciled in a foreign country, it was held that *A*, who was born whilst his father, *D*, was domiciled in such foreign country, and was legitimated by the subsequent marriage in such country of *D* with *A*'s mother, was a legitimate child of *D*, and entitled to share in the English realty devised to *D*'s children.<sup>3</sup>

To the doctrine that a person legitimated under the law of his father's domicile is to be treated as strictly legitimate in England one objection may be raised.

The doctrine is, it may be urged, inconsistent with the rule, established by *Birtwhistle v. Vardill*,<sup>4</sup> that a person born out of lawful wedlock cannot succeed as heir to real estate in England. This objection is untenable. *Birtwhistle v. Vardill* decides not that a person born out of lawful wedlock cannot, under any circumstances, be treated in England as legitimate, but, what is quite a different point, that he cannot, though legitimated, be heir to English realty.<sup>5</sup>

<sup>1</sup> *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266, which perhaps may be treated as overruling *Boyes v. Bedule* (1863), 1 H. & M. 798, 33 L. J. Ch. 283.

<sup>2</sup> See, especially, judgment of James, L. J., 17 Ch. D., pp. 296—301.

<sup>3</sup> *In re Grey's Trusts*, [1892] 3 Ch. 88.

<sup>4</sup> (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

<sup>5</sup> See Rule 137, pp. 479, 480, *ante*.

## NOTE 17.

## LAW GOVERNING CONTRACTS WITH REGARD TO IMMOVABLES.

What is the law governing a contract with regard to immovables or land?

The *capacity*<sup>1</sup> to enter into a valid contract with regard to land is certainly, and the *formalities*<sup>2</sup> necessary for the validity of such a contract are almost certainly, governed wholly by the *lex situs*. Our inquiry, therefore, concerns only the incidents or material validity<sup>3</sup> of a contract with regard to immovables. As regards the answer to our question when thus reduced within its proper limits, two theories or doctrines are maintainable; they may be termed the doctrine of the *lex situs* and the doctrine of the proper law respectively.

(A) *Doctrine of the lex situs*.—Every question which can possibly arise with regard to rights over land must be answered in accordance with the *lex situs*; hence the validity and effect of a contract in respect of land is governed wholly by the *lex situs*. This appears, at any rate, to be the view maintained by Story.<sup>4</sup> “The consent of the “tribunals, acting under the common law, both in England and “America, is, in a practical sense, absolutely uniform on the same “subject [viz., the supremacy of the *lex situs* in regard to immovable “property]. All the authorities, in both countries, so far as they go, “recognise the principle in its fullest import, that real estate, or “immovable property, is exclusively subject to the laws of the “government within whose territory it is situate.”<sup>5</sup> “The general “principle of the common law is, that the laws of the place where “such property is situate, exclusively govern in respect to the rights “of the parties, the modes of transfer, and the solemnities which “should accompany them.”<sup>6</sup> Though Story does not in so many words refer to contracts with regard to immovables, it is hardly possible to doubt that in his opinion every question whatever—including any inquiry as to the effect of a contract with regard to immovables—ought to be determined in accordance with the *lex situs*. This rule has many advantages. It is intelligible, it is simple, it avoids the necessity for nicely distinguishing between a contract and a conveyance, and in most cases it will undoubtedly be followed by English Courts.

<sup>1</sup> See p. 501, *ante*.

<sup>2</sup> See pp. 502, 503, *ante*.

<sup>3</sup> See Exception 1, p. 510, *ante*, and especially Rule 154, p. 572, *ante*.

<sup>4</sup> See p. 500, *ante*.

<sup>5</sup> Story, s. 428.

<sup>6</sup> Story, s. 424. Compare ss. 454, 430, 431, 435, 463.

(B) *Doctrine of the Proper Law*.—"Contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution."<sup>1</sup>

"A contract relating to immovables is governed and construed by the proper law of its obligation, ascertained in accordance with the principles enunciated in *Jacobs v. Crédit Lyonnais*."<sup>2</sup>

The doctrine enunciated by Mr. Westlake and Mr. Nelson is, therefore, if I understand it rightly, that a contract with regard to immovables is not wholly governed by the *lex situs*, but is at bottom governed by the law to which the parties intended it to be subject, which law constantly is, but need not necessarily be, the same as the *lex situs*. The practical consequence would seem to follow that the excuses for the non-performance of such a contract may depend upon some other law, e.g., the *lex loci contractus*, and not upon the *lex situs*. Nor is there anything at bottom unreasonable in this. If X, an Englishman, agrees in England with A to do some act with regard to land in France, which he is unable to perform, there seems to be no injustice, if the parties really intended to be bound by the law of England, in holding that whether particular circumstances are or are not a legal excuse for non-performance of the contract by X should be determined in accordance, not with the law of France (*lex situs*), but with the law of England (*lex loci contractus*). Nor, again, is there anything inconsistent in this doctrine with the respect due to the authority of a foreign sovereign. No one maintains that an English Court can or will compel a person to perform, with regard to French land, a contract, the performance whereof is forbidden by French law; what is maintained is that if X agrees in England with A to do a particular act in France, he may be compelled in England to pay damages for not performing his promise, and that whether the non-performance is so far excused as to free him from liability to payment of damages is to be determined in accordance with English law. The "doctrine of the proper law" is, however, open to criticism. Suppose the strongest case possible, viz., that a contract made in England with regard to land in France contained a clause which stated in so many words that the contract should be governed by English law. Would any provision in such a contract opposed to the law of France be valid? The land is in France. Nothing can be done in relation to the land which is not in accordance with French law. The clause, therefore, in so far as English law agrees with French law, is needless, and in so far as English law disagrees with French law, is an attempt to evade French law in respect of matters to be done in France, and therefore should not be enforced by the Courts of any other country.<sup>3</sup> There

<sup>1</sup> Westlake (4th ed.), p. 285, citing *Campbell v. Dent* (1833), 2 Moore, P. C. 292.

<sup>2</sup> Nelson, p. 277. See, however, as to the effect of this case, p. 554, note 2, *ante*.

<sup>3</sup> See Intro., General Principle No. II. (C), p. 34, *ante*.

is, at any rate, a great deal to be said in favour of Story's doctrine that all matters connected with land, including the effect of contracts in relation thereto, ought to be governed by the law of the country where the land is situate (*lex situs*).

(C) *Operation of the two doctrines.*—The doctrine of the *lex situs* and the doctrine of the proper law differ in their practical application far less than would at first sight appear, for whichever doctrine we adopt we must always bear in mind three considerations:—

*First.* No conveyance or transfer of land, or of an interest therein, which is not in accordance with the *lex situs*, will be held valid in England.

*Secondly.* The parties to a contract with regard to land do, as a matter of fact, generally intend the contract to be governed by the *lex situs*; the proper law, therefore, of the contract is in most instances the same as the *lex situs*.

*Thirdly.* No contract with regard to land, *e.g.*, in France, can be carried out if its performance be opposed to French law, and no English Court will ever attempt to compel any man to perform in France a contract which French law forbids. The most that our Courts will conceivably do is to make a man pay damages for inability to do in France something which he has promised to do there.

It matters, therefore, in practice very little whether we hold that a contract with regard to land is governed as to its incidents by the *lex situs*, or hold that such a contract is governed by its proper law; still the two different doctrines may, though in rare instances, lead to different results. That this is so may be seen from the following imaginary cases, in each of which it is for the sake of simplicity supposed that X and A are Englishmen domiciled in England, that the contract between them is made in England, and that it contains a clause providing that it shall, as far as possible, be governed by the law of England.

*Case 1.*—X contracts with A to make some disposition of land in France which French law renders impossible, *e.g.*, to entail the land upon A's eldest son and his heirs.

If the contract is governed by the *lex situs* it is void, and no action can be maintained in England for the breach of it. If it is governed by the *lex loci contractus* (proper law) an action may apparently be maintained in England for breach of the contract, *i.e.*, X may be forced to pay damages for his inability to perform his promise.

*Case 2.*—X contracts with A to deal with land in France in some way which French law absolutely prohibits, *e.g.*, to use the land for some purpose which cannot be carried out without exposing X to penalties under the law of France. The contract whether it is

governed by the *lex situs* or by its proper law (*semble*) is void,<sup>1</sup> and no action for the breach thereof can be maintained in England.

*Case 3.*—*X* agrees to convey land in France to *A*. At the time when the contract is entered into *X* is able to carry it out, but under a French law passed after the making of the contract, but before the conveyance of the land by *X*, it becomes impossible for *X* to convey the land to *A*, and *X* is excused from performance of the contract.

If the contract be governed by the *lex situs*, no action is maintainable in England by *A* against *X* for non-performance of his contract. If the contract is governed by the *lex loci contractus* (proper law), an action (*semble*) may be maintainable in England by *A* against *X*.<sup>2</sup>

*Case 4.*—*X* contracts with *A* to provide *A*, six months after the date of the contract, with a room in a foreign country for the performance there of a concert by *A*. Before the date for the performance of the concert some event occurs which under the law of England (proper law) would, if the room had been in England, have excused *X* from the performance of his contract and freed him from liability from damages for non-performance, but which, under the law of the foreign country, does not free *A* from such liability. If the contract is governed by the *lex situs*, an action is maintainable in England against *X* for breach of contract, but if, as would appear to be the case, the contract is governed by its proper law (*lex loci contractus*), an action for breach of contract is not maintainable in England by *A* against *X*.<sup>3</sup>

## NOTE 18.

### THE WILLS ACT, 1861.

24 & 25 VICT. c. 114.

*An Act to amend the Law with Respect to Wills of Personal Estate made by British Subjects.*

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or

<sup>1</sup> See Rule 151, p. 545, and Exception 3, p. 553, *ante*.

<sup>2</sup> Compare *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180, with *Jacob v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 603, *per Curiam*; and as to latter see p. 554, note 2, *ante*.

<sup>3</sup> Compare *Jacob v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, and *Taylor v. Caldwell* (1863), 3 B. & S. 826; 32 L. J. Q. B. 164.

her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicil of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

#### NOTE 19.

#### WHAT IS THE LAW DETERMINING THE ESSENTIAL VALIDITY OF A CONTRACT ?<sup>1</sup>

(A) *Nature of Inquiry*.—A contract is under the law of any country essentially valid when it is a contract of a kind to which the law will give effect; a contract lacks essential validity under the law of a given country, *e.g.*, England, when it is one to which, on account of its nature, the law will not give effect. Thus under the law of England a contract to commit a crime, a contract partaking of champerty, a wagering contract, a contract void for want of consideration, are all materially or essentially invalid. They are contracts which the law treats as void or voidable, and therefore refuses to give them effect, and this because of the nature of the contract. It should be noted,

<sup>1</sup> Westlake, pp. 250—283; Foote, pp. 381—390; Nelson, pp. 261—266.

however, that a contract may be essentially invalid either because it is illegal, *i.e.*, is an agreement which the law in strictness forbids, or because it is an agreement which, though not in any sense forbidden by law, is one to which the law for one reason or another will not give effect; such an agreement (*e.g.*, under the law of England a wagering contract) is not in any strict sense illegal. All contracts which are materially invalid have this feature in common; they are all contracts which, under the law of a given country, are, on account of something in the nature of the agreement, invalid, *i.e.*, void or voidable. Now assume, as we may do, that under the law of every country some contracts are materially invalid, and that the laws of different countries differ more or less as to the contracts which they treat as invalid, and we are at once met by the following question: Whenever a contract contains any foreign element,<sup>1</sup> *e.g.*, is made in England, and is to be performed in France or *vice versa*, and is materially valid under the law of the one country, but materially invalid under the law of the other, by the law of which country is an English Court to determine its material validity? This is, in substance, the inquiry before us.

(B) *Answer to Inquiry*.—The answer to our inquiry is supplied by two different and competing theories; they often lead to the same practical result, but they must be carefully distinguished.

*First theory*.—*The essential validity of a contract is to be tested in the main by the law of the place of performance (lex loci solutionis), though it may occasionally depend also upon the law of the place where the contract is made (lex loci celebrationis); in any case it does not depend upon the intention of the parties.*

This is the position maintained with great ability by Mr. Foote, who sums up his doctrine in these words:—

“The legality,” he writes, “of a contract depends generally upon the law of the place of intended performance.

“An act which is illegal by the law of the place where it is intended to be done cannot be validly contracted for in any place.

“But the legality of the making of the agreement, *i.e.*, the giving a particular consideration for a particular promise — seems to depend upon the *lex loci actus*.”<sup>2</sup>

The point to be noted is that Mr. Foote's theory makes the legality of a contract wholly independent of the intention of the parties, and therefore independent of the “proper law of the contract,” which is nothing else than the law by which the parties intend that their contract shall be governed. “Wide,” he writes, “as the operation necessarily is which is given to the *intention* of the parties to a contract, it is plain that it can have no effect upon the question of the

<sup>1</sup> See Intro., pp. 1, 2, *ante*.

<sup>2</sup> Foote (3rd ed.), p. 390.

“legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all Courts alike.”<sup>1</sup>

This doctrine has great plausibility, and within certain limits is sound.

Parties who contract under a given law cannot at their will make a contract legal and valid, which that law declares to be illegal and invalid. It is also plain that in many cases a contract, which is unlawful by the law of the place where it is to be performed should be held unlawful elsewhere, to which it may further be added that as the law of the place of performance is often the proper law of a contract, Mr. Foote's conclusions in practice constantly coincide with the views of those who conceive that the essential validity of a contract depends to a great extent upon its proper law. But though there seems at first sight good ground for acquiescing in the theory that the validity of a contract is governed by the *lex loci solutionis*, this theory must be, at any rate in the eyes of a writer who is bound by English decisions, open to more than one objection.

*First objection.*—The interpretation of a contract and the obligations undertaken by the parties, or, at any rate, intended to be undertaken by them, must admittedly be governed by the law to which they intended to submit themselves, but it is extremely difficult on the one hand to separate from one another questions as to the validity and questions as to the effect of the terms of a contract, and it is impossible, on the other hand, to maintain that the proper law of a contract is always fixed by the law of the place of performance. When, for example, it is fixed, as in agreements for carriage by sea, by the law of the flag, it cannot be maintained that the proper law of the contract is the *lex loci solutionis*.

*Second objection.*—The theory is, it is submitted, inconsistent with recent decisions of English Courts.<sup>2</sup>

*Third objection.*—If, however, the decisions referred to can (as is possibly the case) be so explained as to be consistent with the decisive influence attributed to the *lex loci solutionis*, the theory that the law of the place of performance in itself governs the validity of a con-

<sup>1</sup> Foote, p. 381. He also shows, though this is a point with which we need not for our present purpose greatly concern ourselves, that an agreement, the making of which is positively prohibited by the law of the country where it is made, should, and probably will, be held void in other countries. Foote, pp. 385, 386.

<sup>2</sup> *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *P. & O. Co. v. Shand* (1865), 3 Moore, P. C. N. S. 272; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321. Compare *Harvyn v. Talisker Distillery*, [1894] A. C. 202. See, however, for the explanation of *Jacobs v. Crédit Lyonnais*, p. 554, note 2, *ante*.



tract is, nevertheless, opposed to the whole course of thought pursued by English judges when determining the question which is now under consideration. They first try to decide what is the country by the law of which a contract is substantially governed, and ask themselves whether a given agreement is an "English contract" or a foreign, *e.g.*, a "French contract." In determining this point they take into account both the terms of the contract itself and all the circumstances of the transaction, such as the character of the parties, the place where the contract is made, the place where it is to be performed, and so forth. When, from this general survey of the facts, they have made up their minds as to the country to which the contract belongs, they then hold that not only the effect, but also the validity, of the contract is governed by the law of such country; if the contract is an English contract they determine its validity, no less than its interpretation, by reference to English law; if the contract is a French contract they determine both these points by reference to French law. That this is the train of thought in the main followed by our judges is apparent from a study of such cases as *Jacobs v. Crédit Lyonnais*;<sup>1</sup> *In re Missouri Steamship Co.*;<sup>2</sup> and *P. & O. Co. v. Shand*.<sup>3</sup> But if this be so, two results follow. The first is, that English Courts do not draw a broad distinction between the law governing the interpretation or effect and the law governing the legality or validity of a contract. The second is, that as the law which governs the interpretation of a contract is the "proper law of the contract,"<sup>4</sup> or, in other words, the law or laws intended by the parties to apply to it, we are driven to the conclusion that, in general, and at any rate indirectly, the validity of a contract is governed by the proper law thereof.

This leads to the

*Second theory.—The essential validity of a contract is (subject to certain wide exceptions) governed indirectly by the proper law of the contract.*<sup>5</sup>

This theory is consistent not only with the language of English judges, but, what is of more consequence, with their mode of thought. They hold that a contract is governed by the law of the country with which it has most substantial connection, or, to put the matter shortly, to which it belongs, *i.e.*, that an English contract is governed by English law, an American contract by American law, and so forth. But when we ask what is the circumstance which in the main determines what is the country to which a contract belongs, we find that it is the

<sup>1</sup> (1884) 12 Q. B. D. (C. A.) 589.

<sup>2</sup> (1889) 42 Ch. D. (C. A.) 321.

<sup>3</sup> (1865) 3 Moore, P. C. N. S. 272.

<sup>4</sup> See p. 529, *ante*.

<sup>5</sup> See Rule 151, p. 545, *ante*, and compare especially Westlake (4th ed.), p. 282, and Nelson, p. 266. Westlake comes nearly, but not quite, to the conclusion here expressed.

intention of the parties, or, in other words, we are brought round again to the conclusion that the essential validity of a contract is in the main determined by the proper law thereof. We can now see what is the real meaning of English judges when they decline, as they often most rightly do, to be bound by any hard and fast rule as to the law governing the construction or validity of a contract. They do not intend to question the principle that a contract is governed by the law or laws to which the parties intended to submit themselves, but do intend to express the perfectly sound doctrine that in ascertaining what this intended law is, a Court ought to take into account every circumstance of the case, and ought not to be tied down to any rigid presumption that the parties must have intended to be bound by a particular law, whether it be the *lex loci celebrationis*, or the *lex loci solutionis*.

The theory, again, that the material validity of a contract is governed by its proper law explains (if the wide exceptions thereto be taken into account) how it happens that the validity of a contract is constantly governed by the *lex loci solutionis*. The reason is none other than that the *lex loci solutionis* is more often than not the proper law of a contract.

In order, however, to do justice to the second theory, we must bear in mind its limitations, or, in other words, the width of the exceptions to the rule that the validity of a contract depends on its proper law.<sup>1</sup>

These exceptions all flow from two obvious principles.

The first principle is that an English Court will not enforce any contract which is opposed to the law of England, or to the morality supported by the law of England.<sup>2</sup>

The second principle is that a contract will be held in general invalid in England which involves the doing in any civilised country of an act which is forbidden by the law of that country. This applies whether the unlawful act be the *making* of a contract or the *performance* of a contract.<sup>3</sup>

Our theory, moreover, is not, when rightly understood, really inconsistent with the views of the best writers.

Story holds that the nature, the obligation, and the interpretation of a contract are all governed by the same law,<sup>4</sup> and this law, though at first sight one might suppose it from his language to be the law of the place where the contract is made, clearly is with him the law which the parties intended to adopt.<sup>5</sup>

<sup>1</sup> See Exceptions 1-3 (pp. 549-553) to Rule 151, *ante*.

<sup>2</sup> For examples, see *Robinson v. Bland* (1760), 2 Burr. 1077; *Grell v. Levy* (1864), 16 C. B. N. S. 73; *Biggs v. Lawrence* (1789), 3 T. R. 454; *Clugas v. Penaluma* (1791), 4 T. R. 466; *Pearce v. Brooks* (1866), L. R. 1 Ex. 213, and General Principle No. II. (A), (B), p. 34, *ante*.

<sup>3</sup> See General Principle No. II. (C), p. 34, *ante*.

<sup>4</sup> Story, s. 263.

<sup>5</sup> Compare ss. 263 and 280.

Mr. Foote, no doubt following in this, it must be admitted, the language of Story, holds, as already pointed out, that the *lex loci solutionis* must be decisive. But all that is true in this theory is met by the consideration that the *lex loci solutionis* is more often than not the proper law of a contract, and that in general a contract is invalid which cannot lawfully be performed at the place of performance.

Westlake's opinion comes very near to the admission that the proper law of a contract is the law governing its validity.

"It may," he writes, "probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such."<sup>1</sup>

But Westlake himself lays down that "a contract which is illegal by its proper law cannot be enforced,"<sup>2</sup> and in commenting on *Jacobs v. Crédit Lyonnais*,<sup>3</sup> and *Re Missouri Steamship Co.*,<sup>4</sup> writes: "It must be admitted that in both cases a stress was laid by the learned judges on the intention of the parties, as the governing element in the choice of a law, which is not in accordance with the discussion preceding the § [*i.e.*, § 212], and which, where the lawfulness of the intention is itself in question, as it was in *Re Missouri Steamship Co.*, I still find it difficult to reconcile with the logical order to be followed."<sup>5</sup> Westlake, in short, apparently holds that the law generally governing a contract determines its essential validity, but does not think that its validity can in any way depend on the intention of the parties.

The truth is, that the doctrine laid down in Rule 151,<sup>6</sup> and here advocated, is clearly open to one grave objection.

The proper law of a contract, it may be objected, is the law chosen by the parties and intended by them to govern the contract. If, then, it may be argued, the proper law of a contract determines its essential validity, the legality of an agreement depends upon the will or choice of the parties thereto; but this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce; the statement, for example, that under the law of England a promise made without a consideration is void, means neither more nor less than that the law will not enforce such a promise even though the parties intend to be legally bound by it, and this state

<sup>1</sup> Westlake, s. 212, p. 280.

<sup>2</sup> Westlake, s. 213.

<sup>3</sup> 12 Q. B. D. 589.

<sup>4</sup> 42 Ch. D. 321.

<sup>5</sup> Westlake, p. 281.

<sup>6</sup> See p. 545, *ante*.

of things cannot be altered by the fact that Englishmen contracting in England intend, and even in so many words express their intention, that a promise made by one of them, *X*, to the other *A*, shall, though made without a consideration, be governed by the law of a foreign country, and therefore be valid. The same objection is sometimes put in another shape. *X* and *A* enter in England into a contract to be performed partly in England and partly in another country, *e.g.*, the Mauritius. The whole of it, or one of its terms, is valid by the law of England, but invalid by the law of the Mauritius. Is the contract or the term in question to be held valid or not? If you look to the intention of the parties, it is in the absence of fraud an almost certain presumption that they meant to contract with reference to the law which makes the contract valid. Hence, however, the result would follow that where there is a question between two possible laws under one of which a contract is, and under the other of which a contract is not valid, the contract must always be held valid.<sup>1</sup> But this result is absurd. Whatever form, in short, the objection takes, it amounts to this, that the essential validity of a contract cannot depend upon the choice of the parties thereto, but that to make the validity of a contract depend upon its proper law is to make its essential validity depend on the choice of the parties.

The reply to this objection is that its force depends on a misunderstanding of the principle contended for. No one can maintain that persons who really contract under one law can by any device whatever render valid an agreement which that law treats as void or voidable. What is contended for is that the *bond fide* intention of the parties is the main element in determining what is the law under which they contract. To put the same assertion in another form, an English contract is governed by English law, a French contract is governed by French law; but when, say, an Englishman and a Frenchman, or two Englishmen, enter in England into a contract to be wholly or partly performed in France, their *bond fide* intention is, at any rate, the chief element in determining whether the contract is an English contract or a French contract.<sup>2</sup> No doubt, in deciding this matter, the Court must regard the whole circumstances of the case. As regards the interpretation of the contract, the expressed intention is decisive; as regards its essential validity or legality, this is not quite so certainly the case. If it is clear they meant to contract under one law, *e.g.*, the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the Court their real intention was to enter into an English contract.

<sup>1</sup> Compare *P. & O. v. Shand* (1865), 3 Moore, P. C. N. S. 272.

<sup>2</sup> Compare *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589.

If this one solid objection to our theory be removed, the doctrine that, according, at any rate, to the view of English judges, the essential validity of a contract is determined by its proper law is, it is submitted, made out. It will be noted that in Rule 151,<sup>1</sup> the statement is made that the essential validity of a contract is governed "indirectly" by its proper law. The word "indirectly" is inserted for the very purpose of showing that the parties cannot directly determine by their choice whether a contract shall be legal or not. What they can do is to determine what is the law under which they in fact contract, and the rules of this law, *i.e.*, the proper law will, subject, however, to wide exceptions, determine whether a contract is essentially valid or invalid.

## NOTE 20.

POWER OF APPOINTMENT AND THE WILLS ACT, 1861.<sup>2</sup>

*Question.*—*Is a will of movable property which is valid only under the Wills Act, 1861 (24 & 25 Vict. c. 114), a good exercise of a power of appointment "by will,"<sup>3</sup> or "by will duly executed" ?*

To this inquiry an affirmative answer has been given, though with hesitation, in Rule 189 (1) (c),<sup>4</sup> whilst a negative answer is to be found in at least one book of high authority.<sup>5</sup> To arrive at a just conclusion with regard to an admittedly difficult question, it is necessary to consider, first, the state of the law with regard to the due exercise of a power of appointment by will after the coming into force of the Wills Act, 1837 (hereinafter often referred to as the Wills Act), and independently of the Wills Act, 1861; secondly, the argument in favour of the validity of the exercise of such a power by a will valid only under the Wills Act, 1861; thirdly, the objection to such validity, with the replies thereto.

(A) *State of Law.*

*First.*—A power of appointment by will might, under the Act of 1837, and still may quite independently of the Wills Act, 1861, be duly exercised in two different ways, namely, either by a will made in

<sup>1</sup> See p. 545, *ante*.

<sup>2</sup> *In re Daly's Settlement* (1853), 25 Beav. 456; *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *D'Huart v. Harkness* (1866), 34 Beav. 324; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In re Kirvan's Trusts* (1883), 25 Ch. D. 373; *Bald v. Bald* (1897), 66 L. J. Ch. 524; *Hummel v. Hummel*, [1898] 1 Ch. 642; *Re Price*, [1900] 1 Ch. 442; *Barretto v. Young*, [1900] 2 Ch. 339; the Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10; the Wills Act, 1861 (24 & 25 Vict. c. 114) (commonly called Lord Kingsdown's Act); Rule 184, p. 667, *ante*; Exception 1, p. 673, *ante*; Exception 2, p. 677, *ante*; Rule 187, p. 680, *ante*; Rule 189 (1) (c), pp. 691, 692, *ante*; Westlake, p. 117; Foote, pp. 273—275.

<sup>3</sup> Notice p. 687, note 2, *ante*.

<sup>4</sup> See pp. 691, 692, *ante*.

<sup>5</sup> Williams, *Executors* (10th ed.), p. 284.

conformity with the formalities required by the Wills Act, 1837, though not in conformity with the formalities required by the law of the testator's domicile (*lex domicilii*),<sup>1</sup> or by a will made in conformity with the formalities required by the law of the testator's domicile, though not in conformity with the formalities required by the Wills Act, 1837.<sup>2</sup>

*Secondly.*—A will otherwise duly executed is not a good exercise of a power of appointment by will if it neither is executed in accordance with other special terms of the power of appointment (*e.g.*, attestation by four witnesses), nor falls within the Wills Act, 1837, s. 10. In other words, no will is a good exercise of a power unless the will is either executed exactly in the manner required by the terms of the power, or is exempted from compliance with such terms by the Wills Act, 1837, s. 10.<sup>3</sup>

This condition of the law involves the assertion that the rule as to powers of appointment by will was, after the Wills Act came into force (1838), as it still remains after the passing of the Wills Act, 1861, anomalous. A will may be a good exercise of a power of appointment though it would not be valid merely as a will; and, on the other hand, a will may be valid as a will and not valid as the exercise of the power of appointment. Thus, a will executed in France in accordance with the formalities required by the Wills Act, 1837, though not in accordance with the formalities required by the law of the testator's French domicile, may be a good exercise of a power of appointment, though it would not be valid as a will;<sup>4</sup> whilst a will executed in accordance with the law of the testator's French domicile, and therefore valid as a will, may be invalid as the exercise of a power for want of compliance with special terms as to execution, *e.g.*, attestation by four witnesses, required by the power.<sup>5</sup>

#### (B) *Argument in support of validity.*<sup>6</sup>

This argument consists of two propositions:—

*Proposition 1.*—Any will which is entitled to probate is *prima facie* a will duly executed, and therefore a valid exercise of a power of appointment by will.<sup>7</sup>

<sup>1</sup> *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In Goods of Huber*, [1896] P. 209. See Rule 189 (1) (b), p. 691, *ante*.

<sup>2</sup> *D'Huart v. Harkness* (1865), 34 Beav. 324; *In re Price*, [1900] 1 Ch. 442.

<sup>3</sup> *I.e.*, falls within Rule 190 (p. 697, *ante*), and does not come within the Exception thereto (p. 699, *ante*). It is clear that this Exception—in other words, the exemption under the Wills Act, 1837, s. 10—applies only to wills executed with the formalities required by the Wills Act, s. 9. For the exact terms of the Wills Act, s. 10, see p. 699, note 2, *ante*.

<sup>4</sup> *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Huber*, [1896] P. 209. See Rule 184, p. 667, *ante*.

<sup>5</sup> *In re Daly's Settlement* (1858), 25 Beav. 456.

<sup>6</sup> *I.e.*, in support of Rule 189 (1) (c), p. 691, *ante*.

<sup>7</sup> *D'Huart v. Harkness* (1865), 34 Beav. 324; *In re Price*, [1900] 1 Ch. 442.

This principle is distinctly laid down in *D'Huart v. Harkness*:—  
 “When a person simply directs that a sum of money shall be held  
 “subject to a power of appointment by will, he does not mean any  
 “one particular form of will recognised by the law of this country, but  
 “any will which is entitled to probate here. A power to appoint by will,  
 “simply, may be executed by any will, which, according to the law of  
 “this country, is valid.”<sup>1</sup>

In 1900 the case of *In re Price* follows *D'Huart v. Harkness*. In reference to the words “shall by her last will appoint,” the law is thus laid down by Stirling, J.:—“The first question arises as to the  
 “word ‘will’ which there occurs—whether it means any instrument  
 “recognised by the law of England as a will, or a will executed in  
 “accordance with the law of England”;<sup>2</sup> and the judge, adopting the very words used by the Court in *D'Huart v. Harkness*, says that  
 “it means a will so executed as to be good according to English law.  
 “Here it is admitted to probate, and that is conclusive that it is good  
 “according to the English law. The English law admits two classes  
 “of wills to probate—first, those which follow the forms required by  
 “1 Vict. c. 26, s. 9, and secondly, those executed by a person  
 “domiciled in a foreign country, according to the law of that country,  
 “which latter are perfectly valid in this country.”<sup>3</sup>

*Proposition 2.*—A will coming within the Wills Act, 1861, is entitled to be admitted to probate; it is therefore good according to English law, and is a good exercise of a power of appointment by will. In other words, the principle laid down in *D'Huart v. Harkness*, and confirmed by *In re Price*, is wide enough to cover wills of British subjects which owe their validity only to the Wills Act, 1861.

It is, of course, the case that neither of these decisions has reference to a will valid only under the Wills Act, 1861; their importance lies in the principle which they lay down. With *D'Huart v. Harkness* and *In re Price* should be read the line of cases from *In Goods of Alexander* to *In Goods of Huber*. These refer, indeed, only to the validity of a power of appointment made in accordance with the law of the testator's domicile; but they, too, show that under English law a will admitted to probate is, as such, a good exercise of a power.

### (C) *Objection and Answers.*

*Objection.*—“It has been decided . . . by the cases of *Re Kirwan's Trusts*<sup>4</sup> and *Hummel v. Hummel*<sup>5</sup> that a will which was only valid  
 “by virtue of 24 & 25 Vict. c. 114 (Lord Kingsdown's Act), is not a

<sup>1</sup> *D'Huart v. Harkness*, 34 Beav. 324, 328, judgment of Romilly, M. R.

<sup>2</sup> *In re Price*, [1900] 1 Ch. 442, 447, judgment of Stirling, J.

<sup>3</sup> *Ibid.*

<sup>4</sup> (1383), 25 Ch. D. 373.

<sup>5</sup> [1898] 1 Ch. 642.

“ valid execution of a power, whether special or general, unless the will is executed in the presence of and attested by two witnesses as required by sects. 9 and 10 of the Wills Act. In the first of these cases it was held by Kay, J., that a holograph codicil of a British subject made in France and unattested, which had been admitted to probate under Lord Kingsdown’s Act, was invalid as a testamentary exercise of a power of appointment given by an English will, sects. 9 and 10 of the Wills Act not being revoked by Lord Kingsdown’s Act, which does not deal with powers of appointment. And in *Hummel v. Hummel*, the second of the above-mentioned cases, where a daughter of a testator had under her father’s will a general testamentary power of appointment, no formalities of execution being specified, over a share of residuary estate, Kekewich, J., following *In re Kirwan’s Trusts*, held that a disposition made by the daughter in France, by a writing signed by her and not attested, but valid as a will according to French law, would not, even if admissible to probate under sect. 1 of Lord Kingsdown’s Act, operate as an execution by the daughter of her general testamentary power of appointment by will.”<sup>1</sup>

The cogency of this objection, which may be put in various forms, is increased by the fact that the Wills Act, 1861, neither repeals any part of the Wills Act, 1837, nor makes any reference to powers of appointment. Any argument, therefore, it may be urged, in favour of the validity of a power of appointment exercised by a will which is valid only under the Wills Act, 1861, *i.e.*, which does not comply with the formalities required by the Wills Act, 1837, s. 9, directly contradicts the words of the Wills Act, 1837, s. 10, which enact that “ no appointment made by will in exercise of any power shall be valid unless the same be executed in the manner hereinbefore required,” *i.e.*, in accordance with the formalities required by sect. 9, *e.g.*, attestation by two or more witnesses. This objection, in whatever way it is put, is on the face of it a strong one. It is, however, open to at least three answers, which must be considered as part of one argument intended to show that this objection, until supported by clear decisions in its favour, is, to say the least, not of decisive authority.

*Answer 1.*—The two cases relied upon in support of the objection are absolutely inconclusive. *In re Kirwan’s Trusts* is, it is conceived, rightly decided. The judgment of the Court is mainly based on two quite sufficient grounds, namely, the non-compliance of the will or testamentary document with the special terms of the power of which it was alleged to be an exercise, and the fact that the will was bad as a fraud upon the power. No doubt Kay, J., held that a will, valid or entitled to probate only under the Wills Act, 1861, but not comply-

<sup>1</sup> 1 Williams, *Executors* (10th ed.), p. 284.



ing with the formalities required by the Wills Act, 1837, s. 9, viz., attestation by witnesses, could not be a good execution of a power of appointment. But it is not easy to read the judgment of Stirling, J., in the case *In re Price*<sup>1</sup> without seeing that he doubted the authority of *In re Kirwan's Trusts* in support of a proposition which was assuredly not necessary to the decision of the case.

*Hummel v. Hummel* was intended to follow *In re Kirwan's Trusts*, but as reported it is utterly unsatisfactory. All the facts stated show that the testatrix, who had married an Austrian, was not a British subject. This being so, it is hard to understand how any reference whatever could be made to the Wills Act, 1861, s. 1, which refers only to the wills of British subjects. The cases relied upon being, to say the least, inconclusive, the matter under discussion must be decided upon principle.

*Answer 2*—The objection made proves too much. True it is that if the widest sense possible be given to the Wills Act, s. 10, no appointment made by will in exercise of any power—at any rate, if it is a power created under an English instrument—which does not comply with the requirements of the Wills Act, s. 9, can be a valid exercise of the power. But this interpretation of sect. 10 is inconsistent with the admitted fact that a will executed in accordance with the formalities required by the law of the testator's domicile, *e.g.*, France, and therefore, it may be, not attested as required by the Wills Act, s. 9, is a good exercise of a power to appoint by will, even though the power be created by an English instrument.<sup>2</sup>

A will, it may be said, made by a person domiciled abroad, lies altogether outside the purview of the Wills Act, and sect. 10, therefore, of that Act does not apply to such a will. Let this be granted: a consequence follows which has not perhaps been sufficiently noted. It is that a will made by a British subject may, if he is domiciled out of England, be a good exercise of a power of appointment, even though the will is admitted to probate and is valid wholly under the Wills Act, 1861. *T* is a British subject whose domicile of origin is Maltese. *T*, whilst retaining his British nationality, acquires a domicile at New York. *T*, whilst he has a domicile at New York, executes a will whilst he is in France. The will is executed in accordance either with the law of France (*lex actus*) or in accordance with the law of Malta, where *D* had his domicile of origin. Assume, what in these circumstances is almost certainly the case, that the will is not valid under the law of New York (*lex domicilii*). The will is intended to be the exercise of a power to appoint by will of which *T* is the donee under an English instrument. The will is not a valid will under the law of *D*'s domicile.

<sup>1</sup> [1900] 1 Ch. 442, 446.

<sup>2</sup> See p. 691, *ante*.

The will is not a good exercise of a power of appointment under the Wills Act, 1837, s. 10. But surely it must be held a good exercise of a power of appointment by an English Court. *T* is a British subject. His will is one which, under the Wills Act, 1861, s. 1, must be held to be well executed for the purpose of being admitted to probate, either because the will is made according to the forms required by the law of the place where the same was made (France) or because the will is made according to the forms required "by the laws then in force in that part" of His Majesty's dominions where [*T*] had his domicil of origin" [Malta]. Nor can it be alleged that the will is invalid under the Wills Act, 1837, s. 10, for "the provisions of sects. 9 and 10 of the Wills Act" have no application to wills of persons not domiciled in England. "This was decided in the case of *In re Price*."<sup>1</sup> If, however, it be admitted that a will made by a British subject domiciled abroad, though its validity is due wholly to the Wills Act, 1861, s. 1, is a good exercise of a power of appointment by will, the reason of this must be that such a will is a compliance with the intention of the donor of the power that the power should be exercised by a will duly executed. And this, in fact, comes very near to an admission that any will admitted to probate—and every will that comes within the Wills Act, 1861, must be admitted to probate—is a good exercise of a power of appointment. For the rules as to powers of appointment by will, though anomalous, rest on an intelligible principle. The main point to be considered, as the Courts have held, is whether the appointment is exercised in the manner laid down by the donor of the power. When he provides that the power shall be exercised "by will," or "by will duly executed," the one essential inquiry is, what does he mean by these terms? In the case of two classes of wills the answer given has been in substance, "he means any will admitted to probate, and therefore a good will according to English law." The same answer must, it now appears, be given in the case of a will executed abroad by a British subject who is not domiciled in England, which is admitted to probate and valid only under the Wills Act, 1861. It is difficult, however, to find any plain reason why in the single case of such a will being made abroad in exercise of a power by a British subject who is domiciled in England, it should be denied that the donor of the power meant that the power should be exercised by a will which is necessarily admitted to probate, and is therefore conclusively shown to be valid according to English law.

*Answer 3.*—A will valid only under the Wills Act, 1861, which does not comply with the requirements of the Wills Act, 1837, s. 9, cannot, it is clear, be a valid exercise of a power of appointment if such a

<sup>1</sup> *Barretto v. Young*, [1900] 2 Ch. 339, 343, judgment of Byrne, J., referring to words of Stirling, J.: "The Wills Act had no application, inasmuch as the 'testator was domiciled abroad.'" *In re Price*, [1900] 1 Ch. 442, 452.

will comes at all within s. 10; but the very point at issue is whether such a will comes within the operation of s. 10. It is, at any rate, arguable that s. 10 does not apply.

It is possible, in the first place, that the two Acts ought to be read together. They might be so read without any substantial inconsistency. The Wills Act, s. 10, provides that no will shall be a valid exercise of a power which is not executed in accordance with the formalities required by s. 9, *i.e.*, with the formalities required by the Wills Act. If the two Acts be read together, the Wills Act, 1861, in reality adds certain additional forms under which under these Acts a will may be made by a British subject, which must be held to be well executed for the purpose of being admitted to probate, and which therefore is valid under English law. If one looked at the mere common sense of the matter, there would, it is submitted, be nothing unreasonable in holding that a will made in accordance with these additional forms was made in accordance with the requirements of the Acts, and was therefore, as such, a good exercise of a power of appointment.

It may, in the second place, be contended that sects. 9 and 10 must be read together, and that the provisions of sect. 10 apply only to wills which, in order that they may be admitted to probate and valid, must be executed in accordance with sect. 9. That certain wills, *e.g.*, wills executed by persons domiciled abroad, have quite independently of the Wills Act, 1861, been admitted to probate and held valid, and therefore held to be good exercises of a power of appointment, though they did not in any way comply with the requirements of sect. 9, and that on the same ground a will valid only under the Wills Act, 1861, may, as it is admitted to probate and valid, be treated as a good exercise of a power of appointment.

What is at bottom the same point may be put in a different form. Before the passing of the Wills Act, 1861, the principle was established that a will which, being admitted to probate, was thereby shown to be, according to English law, a valid will, must, though it did not fulfil the requirements of the Wills Act, 1837, s. 9, be held to be a valid exercise of a power to appoint by will. This principle was not deemed inconsistent with the provisions of the Wills Act, s. 10. The effect of the Wills Act, 1861, was to create a new class of wills, which, though not complying with the provisions of the Wills Act, s. 9, were held to be good for the purpose of being admitted to probate in England, and therefore valid wills according to English law. Such wills would of themselves fall within the established principle that a will admitted to probate, and therefore valid according to English law, was, even though it did not fulfil the requirements of s. 9, a valid exercise of a power of appointment by will. To produce this result it was not necessary either to repeal the provisions of the

Wills Act, s. 10, or to make any reference to a power of appointment by will. All that was needed was to create a will of a new class, which should be held to be well executed for the purpose of being admitted to probate, and therefore under a principle already established a valid exercise of a power of appointment; and this, it is submitted, is exactly what is done by the Wills Act, 1861.

### *Conclusion.*

(1) The question discussed in this note is not determined by any case of decisive authority.

(2) A will of the kind to which this note refers is probably, if made by a British subject not domiciled in England, a valid exercise of a power of appointment by will.

(3) Whether such a will, if made by a British subject domiciled in England, is a valid exercise of a power of appointment, is a question as to which, in the absence of judicial decisions, it is impossible to give an absolutely certain answer.<sup>1</sup>

## NOTE 21.

### THE EWING v. ORR EWING CASE.<sup>2</sup>

*D* has died domiciled in Scotland, possessed of movable and immovable property there, and of only a small amount of personal property in England. He has appointed six persons executors and trustees under his will. Of these some reside in Scotland, some in England. They obtain confirmation of the will in Scotland, and the confirmation is sealed in England under 21 & 22 Vict. c. 56.<sup>3</sup> *A*, an infant legatee, resident in England, brings an action by his next friend for administration of the estate. The writ is served upon the trustees in England, and under an order upon the trustees in Scotland. The trustees

<sup>1</sup> Compare, however, Westlake, p. 117.

"But notwithstanding admission to probate or grant of administration with the document annexed, under Lord Kingsdown's Act, the power will not be held to have been well executed unless either the formalities prescribed by the power, or those of the Wills Act, are satisfied: *Re Kirwan's Trusts* (1883), 25 Ch. D. 373, *Kay v. Hummel v. Hummel*, [1898] 1 Ch. 642, Kekewich. Where, however, the will is good in form by the law of the last domicile, *D'Huart v. Harkness* will apply, not merely to the proceedings in the Court of Probate, but also so as to make the document a good execution of a simple power to appoint by will: *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442, Stirling. At least, so far as it can be such an execution without calling in the aid of the Wills Act, s. 27, which makes a general bequest a good execution of a general power. *Re D'Este's Settlement Trusts, Poulter v. D'Este*, [1903] 1 Ch. 898, Buckley." But see as to s. 27, Rule 191, p. 700, and following.

<sup>2</sup> (1883), 9 App. Cas. 34. And see *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453 (Scotch); Westlake, pp. 123, 124; Foote, pp. 265—267, 282; 2 Willingams, Executors (10th ed.), pp. 1286—1290.

<sup>3</sup> See Rule 123, p. 454, *ante*.

appear without protest. It is held that the Court has jurisdiction to administer the trusts of the will as to the whole of the estate, whether in England or in Scotland, and that, as no proceedings are pending in a Scotch Court by which the interest of the infant could have been equally protected, the exercise of the jurisdiction is a matter not of discretion, but of justice.

This statement contains the essential circumstances, and gives the whole direct effect, of the English case of *Ewing v. Orr Ewing*.<sup>1</sup> The decision of the House of Lords refers in strictness rather to proceedings against trustees than to proceedings against personal representatives. From this point of view the case does little more than carry out the principle involved in *Penn v. Baltimore*,<sup>2</sup> and all it appears absolutely to decide is that, where the executors of a person dying domiciled in a foreign country are also trustees under his will, the Court has jurisdiction to entertain an action for the execution of the whole of the trusts under the will against the trustees who are in England and the trustees who can be served with a writ in a foreign country.<sup>3</sup>

But though this is all which is necessarily decided in the English case of *Ewing v. Orr Ewing*, the following points with regard to the administration of a deceased person's property are raised and more or less authoritatively determined in the two *Orr Ewing Cases*.

(1) Lord Westbury's doctrine<sup>4</sup> that the Courts of the country in which a deceased person is domiciled at the time of his death have *exclusive* jurisdiction to administer his movable property is negatived.

(2) Under an ordinary grant of administration the High Court has, on being appealed to, jurisdiction to administer the whole of the movable property of the deceased, whatever its local situation, and whether he has died domiciled in England or in a foreign country.<sup>5</sup>

(3) The Courts of a foreign country, *e.g.*, Scotland, have a right, if they see fit, to deal with and administer property of the deceased locally situate in that country.<sup>6</sup>

(4) A personal representative under an English grant, which is not limited, is liable to account for assets out of England,<sup>7</sup> but his liability in regard to foreign assets would seem to depend upon his relation to them, *i.e.*, upon his legal power to get possession of and deal with such assets.<sup>8</sup>

<sup>1</sup> Compare *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453.

<sup>2</sup> (1750), 1 Ves. Sen. 444. See Rule 39, Exception, p. 203, *ante*.

<sup>3</sup> Compare, for this view of the case, *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34, 46, judgment of Lord Blackburn, and p. 48, judgment of Lord Watson, with *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453, 522, 523, judgment of Lord Blackburn.

<sup>4</sup> *Enchin v. Wylie* (1862), 10 H. L. C. 1, 13, 15, 16.

<sup>5</sup> *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34, 39, judgment of Selborne, C.

<sup>6</sup> *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453. See Rule 89, p. 391, *ante*.

<sup>7</sup> See Rule 73, p. 343, *ante*.

<sup>8</sup> Compare 2 Williams, Executors, 1286—1290.

The result of the conclusions which may be deduced from or are suggested by the *Orr Ewing Cases* is that conflicts may undoubtedly arise between English Courts and the Courts of a foreign country as to the administration of a deceased person's movable property, and that "whenever a real conflict of jurisdiction does arise between two independent tribunals, the better course for each to pursue is to exercise its own jurisdiction so far as it availably can, and not to issue judgments proclaiming the incompetency of its rival."<sup>1</sup> These words of Lord Watson's are a valuable recognition, be it noted, of the principle of effectiveness, or, in other words, of the principle maintained throughout this treatise, that a Court's jurisdiction ought to be limited by its power to enforce its judgments.<sup>2</sup>

## NOTE 22.

QUESTIONS WHERE DECEASED LEAVES PROPERTY  
IN DIFFERENT COUNTRIES.<sup>3</sup>

A testator or intestate may, at his decease, leave property of different kinds in different countries, *e.g.*, movables in England and immovables in Scotland. And "where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine what portion of each law is to enter into the decision of the question [of the distribution of, or claims upon, the property]. It is not easy to say how much is to be considered as depending on the law of real property [immovables]; which must be taken from the country where the land lies [*lex situs*]; and how much upon the law of personal property [movables]; which must be taken from the country of the domicile; and to blend both together; so as to form a rule, applicable to the mixed question, which neither law separately furnishes sufficient materials to decide."<sup>4</sup> These words refer to the question how far the heir of heritable property in Scotland which an English will has been inoperative to pass, being a legatee of personal property in England, is put to his election. But they apply in principle to all the various questions which may arise when a deceased person leaves property of one description, *e.g.*, movables, in England, and property of another description, *e.g.*, immovables, in a foreign country. The general rule, no doubt, is that

<sup>1</sup> *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453, 532, judgment of Lord Watson.

<sup>2</sup> See Intro., General Principle No. III., p. 40, *ante*.

<sup>3</sup> Westlake (4th ed.), pp. 138—147; Foote (3rd. ed.), pp. 208—313, 222—227; Nelson, pp. 198, 199.

<sup>4</sup> *Brodie v. Barry* (1813), 2 Ves. & B. 127, 131, judgment of Grant, M. R.

immovables or land, or rights, or obligations connected with land which are treated by the *lex situs* as immovables, are governed by the *lex situs*, and that movables or things treated by the law of the country where the things are situate as movables<sup>1</sup> are governed by the law of the deceased's domicil (*lex domicilii*). But these two general principles do not lead us far towards answering the different inquiries now calling for consideration. In this Note it will be convenient to confine our attention almost exclusively to cases in which a testator or intestate leaves property of different kinds in England and in Scotland respectively.

The questions which, under these circumstances, may arise, or, at any rate, have arisen, refer in the main to three points:—

(A) The *devolution* of the whole estate.

(B) The heir's right of *recourse* against the movables or personalty.

(C) The heir's *election* between taking under or against a will which, as to immovable property, is invalid.

(A) *Devolution*.—The rule as to this is simple. Every question as to the devolution of *immovables* (land) either under a will or in case of intestacy is to be determined by the law of the country where the immovables are situate<sup>2</sup> (*lex situs*). The *lex situs*, for example, determines whether an instrument, *e.g.*, a Scotch heritable bond,<sup>3</sup> conferring a right relating to an immovable, is itself an immovable; who is the person to whom the immovable descends; and whether a given will is valid as regards immovables.<sup>4</sup> Every question, on the other hand, as to the devolution of movables, such as who is the person entitled to succeed to them beneficially; how they are to be distributed; whether a given will is valid as regards movables; must be determined in general by the *lex domicilii* of the deceased intestate or testator. It must, however, be here as elsewhere borne in mind that “personal property,” if the term be accurately used, includes, but is not equivalent to, movable property,<sup>5</sup> and that though the beneficial succession<sup>6</sup> to movable property is under English law governed by the *lex domicilii* of the deceased, yet the administration<sup>7</sup> thereof, *e.g.*, as regards the payment of debts, is under English law governed by the *lex fori*, which in this case is equivalent to the *lex situs*, *i.e.*, the law

<sup>1</sup> See Rule 140, p. 497, *ante*.

<sup>2</sup> See Rule 141, p. 500, *ante*, and compare Rule 140, and comment thereon, pp. 497—499, *ante*.

<sup>3</sup> *Brodie v. Barry* (1813), 2 V. & B. 127; *Johnstone v. Baker* (1817), 4 Madd. 474, n.; *Jerningham v. Herbert* (1829), 4 Russ. 388. Heritable bonds are now, under the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117, movables as regards the succession of the creditor in Scotland.

<sup>4</sup> *Brodie v. Barry* (1813), 2 V. & B. 127; *Dundas v. Dundas* (1830), 2 Dow & Cl. 349.

<sup>5</sup> See pp. 74—77, 304—306, *ante*.

<sup>6</sup> See p. 306, *ante*.

<sup>7</sup> See Rule 181, p. 658, *ante*.

of the country (England) where the movable property or personalty is situate and administered.

(B) *Recourse*.—The heir or devisee of immovables in Scotland may have paid in Scotland debts due from the deceased. Can he have recourse against the personal estate in England for repayment? Of course, if the point is dealt with in the will of the deceased, then the rights and liabilities of the heir are governed by the will. If, for example, a testator who leaves personalty in England and real estate in Scotland directs that all his debts shall be paid out of his personal estate, then the right of the heir to look to the personalty in England for repayment of debts of the testator paid by the heir in Scotland is clear. If, however, the matter is not dealt with by the will, then “the right of the heir of foreign immovables . . . to have recourse against the personal estate in England for the amount of debts of the deceased which he has paid, is determined by the *lex situs* of the immovables.”<sup>1</sup> These are the words of Mr. Westlake; they give, therefore, as might be safely assumed, an answer to our inquiry which is, as far as it goes, correct.

A person has died domiciled in a foreign country. *A*, his heir, is compelled to pay debts due there out of land coming to him in such country as heir. But *A* has, under the law of such foreign country, a right to be repaid the amount of the debts out of the deceased’s movables. *A* has, therefore, a right of recourse against the English personalty left by the deceased.<sup>2</sup>

The deceased, again, leaves real estate in Scotland and personalty in England. *A*, his heir, pays ordinary debts of the deceased out of real estate in Scotland. Under Scotch law, he has a right to repayment out of the movable property of the deceased. He has, therefore, a right of recourse against the English personalty.<sup>3</sup>

The heir of Scotch land pays, in 1830, sums due on heritable bonds given by the deceased. Such bonds are under Scotch law a charge upon the real estate, in other words, are payable by the heir. He has no right, therefore, to be repaid out of the English personal estate the sums paid in respect of the bonds.<sup>4</sup>

These cases illustrate and fall within Mr. Westlake’s dictum, but they show, it is submitted, that that dictum, though true, is incomplete. The right of the heir of foreign, *e.g.*, Scotch, lands to have recourse against the personal property of the deceased in England is, no doubt, in one sense, governed by Scotch law (*lex situs*), for in order to have a claim against the personal estate in England, he must show that under Scotch law he has a right to repayment, but his right is in reality

<sup>1</sup> Westlake, s. 118, pp. 139, 140.

<sup>2</sup> *Anon.* (1723), 9 Mod. 66.

<sup>3</sup> *Winchelsea v. Garety* (1838), 2 Keen, 293.

<sup>4</sup> *Elliott v. Minto* (1821), 6 Madd. 16; *Drummond v. Drummond* (1799), 6 Bro. P. C. 601.



governed partly by the *lex situs*, and partly by the law of England (*lex fori*), i.e., the law of the country where English personalty is being administered. It is Scotch law which determines whether there is a debt due to the heir at all from the deceased's estate. It is English law which determines that all debts due from the deceased's estate are primarily payable out of English personalty.<sup>1</sup>

Whether, again, the heir or devisee of English lands who is compelled to pay debts due from the deceased can have recourse for repayment against the movables of the deceased in a foreign country must, it is conceived, on principle depend partly upon English law (*lex situs*), and partly upon the law of the country, e.g., Victoria, where the deceased's movable property is being administered. Under the law of England, *A*, the heir, has a claim against the personal estate out of which the debts are primarily payable.<sup>2</sup> This would *prima facie* give him a claim against the movables of the deceased administered in Victoria, but whether the claim is enforceable in Victoria must ultimately depend upon the law of Victoria.

(C) *Election*.—"Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take, has a choice, but he cannot enjoy the benefits of both."<sup>3</sup>

A question as to election may arise where *T*, a testator, dies, leaving property in England and in a foreign country, and has made a will which, though intended to affect the whole of his estate, is, from some cause or other, valid as to the property in England, but invalid as to the foreign property. In such a case, can a person, e.g., an heir, who takes a benefit under the will in England, be allowed at the same time to gain from its invalidity in the foreign country, or may he be put to his election either to treat the whole will as valid, or, if he takes advantage of its invalidity in the foreign country, to give up the benefit which he would otherwise gain from its validity in England?<sup>4</sup>

*T*, for example, who is domiciled in England, leaves movable property in England and immovable property in Scotland. He has made a will which, as regards his immovable property or land in Scotland, is invalid, and by his will leaves the Scotch land to *N*. He leaves his

<sup>1</sup> The liability of English personalty to the payment of foreign debts of the personal estate and before its distribution is independent of the deceased's domicile.

<sup>2</sup> See 2 Williams, *Executors* (10th ed.), p. 1315.

<sup>3</sup> 2 Story, "Equity Jurisprudence," 2nd English ed., s. 1075, p. 732.

<sup>4</sup> Compare *Brodie v. Barry* (1813), 2 V. & B. 127; *Allen v. Anderson* (1846), 5 Hare, 163; *Dundas v. Dundas* (1830), 2 Dow & Cl. 349.

personal property in England to *A*, who is his heir under Scotch law. The question arises, can *A* both take the Scotch land by descent and, at the same time, take the benefit of the legacy to him of the English personalty, or must he renounce either his rights as heir or his rights as legatee, *i.e.*, is he put to his election?

This question, so far as it depends on a conflict of laws, can, it is submitted, come directly before the English Courts as a question of English law only where *T* either leaves immovable property in England as well as immovable property in some other country, *e.g.*, Scotland,<sup>1</sup> or, what is the more common case, where *T*, *being domiciled in England*, leaves movables either in England or elsewhere, and also leaves immovables in some other country, *e.g.*, Scotland.<sup>2</sup> The question as to election could not come before the Courts as a question of English law, where *T* neither left immovables in England, nor was domiciled in England. In the latter case he might, no doubt, leave movables locally situate in England, but the right to them would depend upon the law of *T*'s domicil, and the question of election, if it arose at all, though it might conceivably come before the English Courts, would be determined by the law of *T*'s domicil, not of England. Thus if *T* died in England, leaving goods there, and also leaving land in Scotland which did not pass under his will, but was domiciled in France, the question (if any arose) as to election would probably come before the French Courts, and ought, if it should come before the English Courts, to be decided by reference to French law.

Bearing in mind these considerations, we may, it is conceived, lay down the following Rule:—

*If a testator devises foreign immovable property (foreign land) under a will which is inoperative to pass the same to the devisee, and also either*

(1) *devises English immovable property (English land) to the heir of the foreign immovable property, or,*

(2) *being domiciled in England, bequeaths movable property wherever situate to the heir of the foreign immovable property,*

*the Court will not allow such heir to take any benefit under the will, as regards the English immovable property or the movable property, unless he fulfils the conditions of the will with respect to the foreign immovable property, i.e., the heir is put to his election.*<sup>3</sup>

Thus “the heir of heritable property in Scotland, becoming entitled “to it in consequence of the will, by which it is devised to another, “not being conformable to the solemnities required by the law of

<sup>1</sup> Compare *Dundas v. Dundas* (1830), 2 Dow & Cl. 349, which is a Scotch, not an English, case, and *Dewar v. Maitland* (1866), L. R. 2 Eq. 834; *Orrell v. Orrell* (1871), L. R. 6 Ch. 302.

<sup>2</sup> *Brodie v. Barry* (1813), 2 V. & B. 127; *Anon.* (1728), 9 Mod. 66; *Trotter v. Trotter* (1828), 4 Bli. 602; *Winchelsea v. Garrett* (1838), 2 Keen, 293; *Allen v. Anderson* (1846), 5 Hare, 163; *Harrison v. Harrison* (1873), L. R. 8 Ch. 342.

<sup>3</sup> Foote (3rd ed.), pp. 222—227; Nelson, p. 199.

“Scotland, and taking also under the same will real or personal property in this country, will be compelled, if the intention to dispose of land in Scotland is clear, to elect between the heritable property which has descended to him as heir, and the benefits given to him by the will.”<sup>1</sup>

If, for the sake of clearness, we assume that a deceased person has left immovable property in Scotland, and has died domiciled in England, leaving there only movable property, the conditions under which the rule as to election applies may be thus stated :—

*First.* *T*, the deceased, must die testate; the rule cannot apply to a case of total intestacy.

*Secondly.* *T* must leave a will intended to deal both with the English movable property or personalty and with the Scotch immovable property. If the will, in the opinion of the English Courts, is not intended to apply to the Scotch immovable property or land, then no question of election arises;<sup>2</sup> the Scotch heir takes any benefit conferred upon him by the will as legatee, and succeeds as heir to the Scotch immovable property. Whether *T* does intend to deal by his will with the Scotch land is a matter of construction to be decided by the law of the country where *T* dies domiciled, *i.e.*, by English law.<sup>3</sup> The answer to this inquiry is complicated, in the reported cases on the subject, by the rule of English law that merely general terms, such as “all my real and personal estate wherever situate,” are not sufficient to show an intention on the part of the testator to deal with property incapable of passing under the will.<sup>4</sup> Hence it may happen that an heir of immovable property in Scotland may take a benefit under a will of English personalty, and also take the Scotch lands by descent, on the ground that, in the opinion of the Court, the will was not intended to deal with the Scotch lands, though to any layman reading the will it would certainly seem that the testator used expressions wide enough to include his Scotch immovable property.

*Thirdly.* The will must be invalid as to the Scotch immovable property. Whether it is invalid or not is to be determined by Scotch law (*lex situs*).

If these conditions are fulfilled, the heir cannot, while taking the Scotch land by descent, also take any benefit under the will as regards the English personal property. He must treat the will either as valid or invalid. If he takes a share in the English personalty under the will, he must not take the Scotch immovable property by descent, *i.e.*, he is put to his election.

<sup>1</sup> 1 White & Tudor, L. Cas. (7th ed.), p. 436.

<sup>2</sup> At any rate in England. What might be the view taken by the Scotch Courts is a question with which we are not here concerned.

<sup>3</sup> *Allen v. Anderson* (1846), 5 Hare, 163; *Trotter v. Trotter* (1828), 4 Bli. 502.

<sup>4</sup> *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705.

If these conditions are not fulfilled, he is not put to his election.<sup>1</sup>

1. *T* (the testator), domiciled in England, dies possessed of immovable (heritable) property in Scotland, and movable property (personalty) in England, Scotland, and elsewhere. *T*, by his will, devises the Scotch immovable property and bequeaths the movable property to trustees in trust to divide the whole equally amongst his nephews. The will is, under Scotch law, invalid as to the Scotch immovable property. *A*, one of the nephews, is under Scotch law heir to the Scotch immovable property. *A* is put to his election either to take the Scotch immovable property against the will as heir and give up his claim as legatee, or, if he takes his share as legatee, to let the Scotch immovable property go according to the will.<sup>2</sup>

2. *T*, domiciled in England, dies possessed of movable property and also of immovable property in Scotland. He devises his immovable property in Scotland to *B*, and also bequeaths equal shares in his movable property to *A* and *B*. The will is, under Scotch law, inoperative as to the Scotch immovable property. *A* is *T*'s heir under Scotch law. *A* is put to his election whether he will take the Scotch immovable property as heir, or the bequest of movable property as legatee.<sup>3</sup>

3. *T*, domiciled in England, directs by will that "the whole of his property" should be divided equally amongst *A*, *B*, and *C*, his brothers and sisters. *T* leaves Scotch immovable property. The will, as to the Scotch immovable property, is invalid. *A* is *T*'s heir, and takes the Scotch land. He is not put to his election, *i.e.*, he also takes his share as legatee. The reason is, that the words "the whole of *T*'s property" do not show an intention to devise the Scotch immovable property.<sup>4</sup>

<sup>1</sup> The law of Scotland as to election is apparently in substance the same as that of England. Hence questions may come before Scotch Courts as to the right of an English heir who claims both to inherit English land on the ground that a Scotch will is invalid to pass it, and also to take a share in Scotch personal property under the will.

The reason, further, why English wills were constantly invalid as regards Scotch immovable property is that, prior to 1868, such property did not pass under an English will in the ordinary form. The Scotch Act of 1868 (31 & 32 Vict. c. 101), s. 20, has apparently put Scotch immovable property, as regards testamentary disposition, in the same position as movable property, and has thereby removed the main source of conflict between English and Scotch law as regards wills of immovable property.

<sup>2</sup> *Brodie v. Barry* (1813), 2 V. & B. 127.

<sup>3</sup> *Harrison v. Harrison* (1873), L. R. 8 Ch. 342.

<sup>4</sup> *Trotter v. Trotter* (1828), 4 Bli. 502. See also *Allen v. Anderson* (1846), 5 Hare, 163; *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705, with which contrast *Orrell v. Orrell* (1871), L. R. 6 Ch. 302, and *Harrison v. Harrison* (1873), L. R. 8 Ch. 342.

## NOTE 23.

EFFECT OF THE *DE NICOLS CASES*.<sup>1</sup>(A) *Legal inferences from the De Nicols Cases.*

From the *De Nicols Cases* may be drawn, though with different degrees of certainty, three legal inferences, which are summed up in the following Rules 1—3.

*Rule 1.*—The rights of a husband *H*, and a wife *W*, over movables belonging to either of them, or acquired by either of them whilst marriage lasts, are governed by the law of their matrimonial domicile.<sup>2</sup>

As regards a marriage in a country like France, which is governed by the Code Napoleon, or generally, in a country the law of which allows the parties to a marriage to make a choice between different property systems for the determination of their rights over property acquired at or after marriage, this proposition may be regarded as pretty well established by *De Nicols Case*, No. 1.

*Rule 2.*—A change of domicile or nationality after marriage in no way affects Rule 1; if, that is to say, *H* or *W*, whose matrimonial domicile is French, afterwards acquire an English domicile or British nationality, and then either of them become possessed of movable property, their mutual rights over such property are still governed by the law of their French domicile. This is the most certain of the conclusions or rules to be deduced from the *De Nicols Cases*. It probably contradicts the opinion of Story, and is not generally accepted in the United States.<sup>3</sup>

*Rule 3.*—The foregoing rules possibly apply to English land, or immovables, as well as to movables.

This rule, though distinctly supported by *De Nicols Case*, No. 2, cannot be treated as established with anything like certainty. It rests upon the authority not of the House of Lords, but of a single judge. Kekewich, J., may have been right, and very possibly was right in holding that in *De Nicols Case*, No. 1, the House of Lords meant to lay down a general principle applicable to immovable no less than to movable property. But this cannot be asserted with absolute confidence. What is certain is that *De Nicols Case*, No. 2, might have been decided on the narrow ground that the land acquired by *H* in England represented movables (money) to a share in which *W* had a right under the principles laid down in *De Nicols Case*, No. 1. Add to this that *De Nicols Case*, No. 2, is in itself not binding upon any superior Court, or upon any Scotch or Irish Court.

<sup>1</sup> *De Nicols v. Curlier*, [1900] A. C. 21 (*De Nicols Case*, No. 1); *Re De Nicols*, [1900] 2 Ch. 410 (*De Nicols Case*, No. 2).

<sup>2</sup> For meaning of matrimonial domicile, see Exception 2, pp. 510, 511, *ante*.

<sup>3</sup> See 3 Beale, Selection of Cases on the Conflict of Laws, p. 530.

(B) *Questions.*

The judgments in the *De Nicols Cases* suggest the following questions:—

1. Do the foregoing three rules apply where the parties to a marriage contract are domiciled in a country, such as England, where, in the absence of a settlement, they have no option as to the law which is to govern their property rights?

2. Do the foregoing rules apply to English land?

3. Does the tacit marriage contract supposed to be entered into by husband and wife in any way affect the rights under English law of third parties, that is (i) of children, (ii) of strangers?

None of these questions are directly solved by the decision in the House of Lords unless it can be assumed, as it is in this Digest, that the *ratio decidendi* in *De Nicols v. Curlier* was founded on the following proposition, namely, that when two persons domiciled in a country contract a marriage, then in the absence of an ante-nuptial settlement, the devolution of all their property, real or personal, present or future, is the same as it would be if there had been an express ante-nuptial contract embodying the law of that country as to the property rights *inter se* of the parties to the marriage. It is certainly doubtful whether the decision of the House of Lords was founded on an assumption of so far-reaching a character. Such being the case the three above-mentioned questions must be considered as still open to discussion and requiring for their final solution a judicial decision.<sup>1</sup>

## NOTE 24.

THE CASE OF *OGDEN v. OGDEN*.<sup>2</sup>

(1) The actual and direct effect of the judgment of the Court of Appeal in *Ogden v. Ogden* may be summed up in one sentence: "The Court approves of and follows *Simonin v. Mallac*."<sup>3</sup> In truth *Ogden v. Ogden* decides nothing whatever which was not determined by *Simonin v. Mallac*, and which has not been treated as good law for some forty-seven years. The whole importance of *Ogden v. Ogden* lies in the language used by the Court of Appeal in delivering judgment.

(2) The language, though not the decision of the Court, does not overrule, but lessens the authority of the doctrine laid down by the

<sup>1</sup> In favour of the adoption by the House of Lords of the doctrine that the parties to a marriage enter, in the absence of a settlement, into a tacit contract that their mutual property rights shall be determined by the law of their matrimonial domicile, see *De Nicols v. Curlier*, [1900] A. C. 21, judgment of Halsbury, L. C. (p. 26), of Lord Macnaghten (*ibid.*, p. 33), Lord Shand (p. 37), and *Re De Nicols*, [1900] 2 Ch. 410, 413, judgment of Kekewich, J.

<sup>2</sup> [1907] P. 107; [1908] P. (C. A.) 46.

<sup>3</sup> (1860), 2 Sw. & Tr. 67.

Court of Appeal in *Sottomayor v. De Barros*, that "as in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile."<sup>1</sup> The Court of Appeal as to-day constituted, clearly leans towards the theory that personal capacity, as in other contracts, so in that of marriage, depends, at any rate when the marriage is celebrated in England, on the *lex loci contractus*. The Court thus throws doubt upon the validity of a principle which has been accepted as law for over thirty years, and which lies at the bottom of the decisions given in several most important cases more or less closely connected with the law governing capacity to marry.<sup>2</sup>

(3) Though the language as to contractual capacity used by the Court which decided *Sottomayor v. De Barros* was probably rather too wide, it may be regretted that the Court which decided *Ogden v. Ogden* did not consider the question whether there may not exist a wide difference between the law which determines the capacity of a person to enter into an ordinary mercantile contract and the law which determines the capacity of a person to enter into the contract of marriage or any contract closely connected with marriage. Reasons suggest themselves why capacity in the one case may be rightly determined by the law of the country where the contract is made (*lex loci contractus*), whilst capacity in the other case may be rightly determined by the law of the country where a party to the marriage contract is domiciled.

(4) In *Ogden v. Ogden* the question of divorce jurisdiction did not in strictness call for decision. The Court of Appeal, however, for the benefit of any woman placed, as was the appellant, in the awkward position of being held in England married to a French citizen, whilst her marriage with him was declared a nullity by French Courts, threw out the suggestion that in such circumstances the wife might probably be treated by the English Divorce Court as having a domicile in England sufficient to support proceedings for the dissolution of her marriage. The suggestion is not in itself unreasonable, but it has had the bad effect of introducing a new, and, as things now stand, a hypothetical and very uncertain exception to the established rule that divorce jurisdiction is and ought to be based upon domicile.<sup>3</sup> With Courts, as with Parliaments, hard cases are apt to produce dubious if not bad law. At present the one certain but far from satisfactory conclusion is that the modern Continental doctrine of preferring nationality to domicile, so logical and simple on the face of it as to have captured most of the legislatures and jurists of Europe, has really led to far more confusion than it prevents.

<sup>1</sup> (1877), 3 P. D. 1, 5.

<sup>2</sup> See *Brook v. Brook* (1861), 9 H. L. C. 193; *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88; *Viditz v. O'Hagan*, [1900] 2 Ch. (C. A.) 87; *In re Bozzelli's Settlement*, [1902] 1 Ch. 751.

<sup>3</sup> *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.





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